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No. 727

In the Supreme Court of the United States

October Term, 1922

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ET AL., *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth District.

BRIEF ON BEHALF OF APPELLANT.

HENRY I. GREEN,
THOMAS F. DORAN,
HARRIS & HARRIS,
Solicitors for Wichita Railroad & Light Co., Appellant.

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No. 722.

In the Supreme Court of the United States

October Term, 1920.

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ET AL., *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Eighth District.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

This suit was brought on April 24, 1918, by appellant to prevent the enforcement against it of the following order of the Public Utilities Commission of the State of Kansas:

(Its) "Docket No. 2344.

In the Matter of the Application of the Kansas Gas and Electric Company for Permis-

sion to Add a Surcharge to certain of Its Rates for Electricity.

Be it remembered that on this 25th day of March, A. D. 1918, the matter of the application of the Kansas Gas and Electric Company for permission to add a surcharge to certain of its rates for electricity, came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission, upon consideration of said pleadings and evidence, finds that the Kansas Gas and Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.

For the next 14,900 KWH per month 1 mill surcharge per KWH.

For the next 20,000 KWH per month 2 mills surcharge per KWH.

For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

The Commission further finds that, until its further order herein, each substation of the Arkansas Valley Interurban Railway Company should not be considered as a separate unit but that monthly bills should be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each sub-station separately.

It is therefore by the Commission considered and ordered: That the Kansas Gas and Electric Company be, and it hereby is, auth-

orized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.

For the next 14,900 KWH per month 1 mill surcharge per KWH.

For the next 20,000 KWH per month 2 mills surcharge per KWH.

For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

It is further by the Commission considered and ordered: That until its further order herein, each substation of the Arkansas Valley Interurban Railway Company shall not be considered as a separate unit, but that monthly bills shall be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each substation separately.

By order of the Commission.

CARL W. MOORE, *Secretary.*

O. K.

JOSEPH L. BRISTOW,
JOHN M. KINKEL,
C. F. FOLEY,
Commissioners."

(Transcript of Record, pages 7-8.)

The above order of the Kansas Public Utilities Commission could be reviewed only by the commencement of an original action in a court of competent jurisdiction. *No statutory appeal from*

the Commission's order is allowed under the laws of Kansas.

The method of *direct* review of the order is prescribed by Section 21 of the Kansas Public Utilities Commission Act as follows:

> "Section 21. *Any* * * * *public utility* governed by the provisions of this act, *or other party in interest, being dissatisfied with any order of the commission* fixing any rate, * * * fare, charge or finding, rules or regulations, * * * schedules, or any order or ruling fixing any regulations, practices or service * * * *may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the public utilities commission as defendant, to vacate and set aside any such order*, finding or decision of the public utilities commission *on the ground that the* * * * *rate*, fare, charges, orders, rules, regulations, *findings*, classifications or schedules in such decisions *are unlawful or unreasonable*, or that any such regulation * * * practice or service fixed in such order or decision is unreasonable. All actions brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different nature pending in such court, *and such action shall be tried and determined as other civil actions.* * * * During the pendency of any action under the provisions of this act, all orders made by the public utilities commission prescribing rates, * * * fares, charges, rules, regulations, classifications or schedules or findings, shall, unless temporarily stayed or enjoined remain in full force and effect until final judgment is

rendered therein. * * * Service of summons on any member of the Board shall be sufficient service on the Board."

We emphasize the fact that this is therefore a *direct* attack, and not a collateral attack, upon the order in question, because the opinion of the court from which this appeal is prosecuted manifestly discloses that the case was viewed in that court as a collateral attack upon the Commission's order; yet the plain language of the Kansas Statute specifically prescribes the procedure followed in this case as the only method of direct attack as by appeal or review of the order in controversy.

The bill of complaint was filed by appellant in the District Court of the United States for the District of Kansas, first division, Judge Pollock presiding.

The District Court entered a decree declaring the said order of the Commission void.

Appeal was prosecuted by the appellees herein, Kansas Public Utilities Commission and the Kansas Gas and Electric Company, from the decree of the District Court, to the Circuit Court of Appeals, Eighth Circuit. The Circuit Court of Appeals, by a divided court, reversed the decree of the District Court and remanded the cause, *with directions to dismiss the complaint.*

Presiding Judge Sanborn of the Circuit Court of Appeals dissented from his colleagues Judges Trieber and Carland.

The case therefore comes to this court with the opinion of two judges of the courts below

that the foregoing order is void, and the opinion of two judges who constituted the majority of the appellate tribunal, holding the order valid.

The opinion of the District Court is printed in full in the record in this case, pages 32 to 42.

The opinion of the Circuit Court of Appeals, together with the opinion by Justice Sanborn, which clearly states the reasons for his dissent, appear in the record, pages 53 to 62.

The scope of the issues in this case, and the law applicable thereto, can be most readily grasped by reading these opinions.

We specifically cite the pages of the record where they may be found, realizing that this court will first read the opinions of the lower courts in this case, and thus best understand the issues and law involved. To further aid the court, we present in chronological order the facts which underlie this litigation.

Appellant, Wichita Railroad and Light Company (which is usually referred to as the "Street Railway Company"), is a corporation organized under the laws of the State of West Virginia, licensed to do business in the State of Kansas.

The Public Utilities Commission of the State of Kansas, sole defendant in the original bill of complaint, is a creature of the Kansas statute and an administrative agent of that state.

The Kansas Gas and Electric Company (sometimes referred to as the "Electric Company" or "Power Company") is also a corporation organized outside of the State of Kansas, but licensed to do business in that state. It became a party

to this cause by filing its intervening petition, asking to be made a party defendant.

On May 2, 1910, the Electric Company, being then engaged in the manufacture and sale of electric current for light, heat and power purposes, entered into a contract with the Street Railway Company, appellant, which contract appears in the record, pages 8 to 17.

This contract provided for the sale by the Electric Company (appellee) to the Street Railway Company (appellant) of electric power to operate a street railway system in the city of Wichita. The term of the contract was from May 2, 1910, to 12 o'clock midnight November 30, 1930. The contract specifically provides the rate to be paid by the Street Railway Company for the power furnished to and consumed by it under this contract *for the entire period.*

In the year 1911 the present statute creating the Public Utilities Commission of the State of Kansas was passed, and the Commission was organized, and on the 4th day of May, 1914, the Electric Company filed with the Commission, as required by law, its schedule of rates to general consumers of electricity, as the same were then in force, but this schedule of rates in no way affected or attempted to change the contract rate of appellant. The rate for the power furnished appellant for the operation of said street railway system was the rate specified in the contract between these two corporations above referred to, and which all parties admit has never been modified or changed, except by the attempted enforcement of the Commission's order involved in this cause.

On January 22, 1918, the Electric Company filed with the Kansas Public Utilities Commission an application for permission to add a surcharge to certain of its rates for electricity in Kansas. This application appears in the record, pages 18 to 20.

The grounds alleged in the petition as a basis of the application to add surcharges to its rates by the Electric Company were:

(a) That the rates to which the applicant asked to apply such surcharge

> "Were filed with the Commission on or about the 4th day of May, 1914; that said rates were based upon the cost of producing and distributing electrical energy at said time, and were intended to and did yield to your petitioner a reasonable return only upon the value of its property used and usable in producing and distributing such electrical energy in the state of Kansas," and
>
> "Your petitioner represents that since the date of the filing of said schedules of rates the cost to your petitioner of producing and distributing such electrical energy has *increased enormously on account principally of the increased cost of fuel and of labor, resulting in a large measure from the unusual conditions which exist throughout the country, due to the fact that the nation is engaged in war.*" (Tr. 18.)

(b) (Tr., 19.) That the Electric Company had reduced its rates for residential and commercial lighting by filing new schedules with the Commission in December, 1916, and had promised to

further reduce residential and commercial lighting rates; that such reductions would materially decrease the earnings of the Electric Company, and that the Commission should therefore make an order authorizing the applicant to establish the surcharges proposed.

(c) That the cost of fuel had materially increased and therefore the Electric Company should be allowed to add the proposed surcharges to its rates for electric energy furnished to large power consumers.

No reference is made in the application of the Electric Company to appellant's contract rates.

The surcharges *asked by the petition* decreased as the quantity of current used per month by the individual consumers increased. That is, the Electric Company asked authority to add surcharges as follows:

> For the first 100 KWH per month, no surcharge.
>
> For the next 1000 KWH per month, 12 mills net per KWH.
>
> For the next 10,000 KWH per month, 9.5 mills net per KWH.
>
> For the next 1,000,000 KWH per month, 8 mills net per KWH.
>
> For all excess KWH per month, 3.5 mills net per KWH.

The petition alleged that the Electric Company had 19,900 consumers, and that 17,000 of these consumers would not be affected by the surcharges for the reason that they used less than 100 KWH

per month; and that the last step in said surcharge schedule affected only six consumers, and the last two steps therein affected only thirty-eight consumers.

The Street Railway Company (appellant) was the largest consumer among the Electric Company's patrons.

On the 25th day of March, 1918, the Commission entered its order in the language above recited, over the signatures of Joseph L. Bristow, John M. Kinkel and C. F. Foley. (Record, p. 7.)

It will be observed that this order finds no fact whatever except that in the opinion of the Commission the Electric Company should be authorized and permitted to add to its existing rates for electricity the following net surcharges:

> For the first 100 KWH, no surcharge.
> For the next 14,900 KWH, 1 mill surcharge per KWH.
> For the next 20,000 KWH, 2 mills surcharge per KWH.
> For all excess over 35,000 KWH, 3 mills surcharge per KWH.

The Commission then ordered that the Electric Company be authorized and permitted to add said surcharges to its existing rates.

The surcharge rates prescribed by this order of the Commission are exactly the reverse in principle of those prayed by the Electric Company in its application to the Commission. The Electric Company asked that the surcharges be less as the quantity used by the consumer increased; while the

Commission's order directs that the surcharge be higher as the quantity used by the consumer increased.

It is patent, therefore, that the order of the Commission violates the fundamental principle of rate making that the rate should decrease as the quantity used increases. At the outset of this statement we have set out *haec verba* the entire order of the Commission from the caption to the signatures. It contained no other finding or language than that quoted above.

The Commission's order contained no finding that the rates with these surcharges added were reasonable or just; it contained no finding that the existing rates which the order sought to abrogate were unreasonable, unjust, preferential or discriminatory; it contained no finding of fact by the Commission as to why any surcharge should be authorized. The order shows an entire absence of any claim or finding or conclusion by the Commission that any conditions prevailed or existed which gave them any authority to fix or prescribe any rate whatever.

We will later herein present to this court the specific provisions of the Kansas statute which prescribe the authority and jurisdiction of the Commission, and lay down in definite and certain language the only conditions under which the Commission could assert or exercise any jurisdiction to fix rates for a public utility.

This order being entered by the Commission, without any of the above necessary findings, the Electric Company, nevertheless, claimed its right

to add these surcharges to the rates fixed by the contract then existing between it and the appellant.

The appellant denies the right of the Electric Company under such an order to abrogate and annul the contractual obligation wherein the rates to be paid for electric current were definitely agreed upon and prescribed for a twenty-year term.

Section 21 of the Kansas Public Utilities Act, creating the Public Utilities Commission, provides that:

> "Any * * * public utility * * * or other party in interest, dissatisfied with any order of the Commission fixing any * * * rate, joint rate, fare, charge or findings, rules or regulations, classifications, schedules * * * may, within thirty days after the making of such order, commence an action in a court of competent jurisdiction, against the Public Utilities Commission as defendant, to vacate and set aside any such order, finding or decision of the Public Utilities Commission on the ground that the * * * rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable."

Apparently the Circuit Court of Appeals failed to take cognizance of the fact that the bill in this case was filed pursuant to said Section 21 of the Kansas Public Utilities Act, providing for the commencement of an action in any court of competent jurisdiction to question the legality or reasonableness of an order of the Commission. They reversed the case and remanded it, with directions to dismiss the complaint. This ignores

the right of the appellant to a trial upon the merits, which it has never had in this case; and this will be separately discussed later herein.

Pursuant to the above provision of the Kansas statute, the appellant filed its bill in the District Court for the District of Kansas, First Division, setting forth the contract between appellant and the Electric Company, and the entry of the order by the Kansas Commission, which, if enforced, operates to abrogate the terms of that contract and impair the obligation thereof. The bill specifically challenges the jurisdiction and power of the Commission by an order of this character to change or modify the written contract between appellant and the Electric Company fixing, for the term of twenty years, the rates, rules and conditions upon which appellant was and is purchasing its electric current to operate its street railway.

The bill also alleged that the order of the Commission was unreasonable and prayed that the same be declared discriminatory, excessive, confiscatory and void. The bill prayed an injunction restraining the enforcement of the order.

Temporary injunction was issued by the District Court as prayed in the bill.

In the first instance the Public Utilities Commission did not appear or answer the bill.

However, the Kansas Gas and Electric Company (appellee) presented its petition to the District Court for leave to intervene; leave was granted and the Electric Company filed its intervening petition setting forth in substance that it was the beneficiary of the order of the Utilities Commis-

sion, and prayed that the District Court dissolve the temporary injunction, and

> "That the said order of the Public Utilities Commission of March 25th, 1918, be declared in all respects a valid and lawful order, and that the intervener be authorized and permitted to enforce the same against the plaintiff, and recover from the plaintiff the amount due the intervener on account of said surcharge for the electrical energy furnished, and for such other and further relief as to the court may deem equitable and just." (Record, p. 25.)

This intervening petition of the Electric Company was filed in this cause on February 7, 1919.

Later, and on the 14th day of May, 1919, the Kansas Public Utilities Commission filed an answer, which is simply a general denial of the material averments of the bill of complaint. (Tr. of Rec., p. 27.)

The execution and existence of the contract between the appellant and the Electric Company, the entry of the order of the Kansas Public Utilities Commission, the language and contents of the original application of the Electric Company for authority of the Utilities Commission to add the surcharges to its rates, and, in fact, all of the facts above recited, being admitted by the pleadings and by stipulation of the parties, and appearing on the face of the record in this cause, the appellant herein filed in the District Court its motion for judgment on the pleadings.

This motion for judgment appears in the record, pages 28 to 30.

The District Court heard arguments and considered briefs filed by counsel for the respective parties on this motion for judgment, and under the admitted facts appearing on the face of the record, rendered the opinion above referred to (Tr. of Rec., pp. 32-42), holding the order of the Commission void upon its face under the admitted facts set forth in the pleadings, and the injunction was made perpetual.

There was no trial of the cause upon the merits in the District Court, but the case was decided in the District Court on the interlocutory motion for judgment on the pleadings.

Upon appeal being prosecuted by the Electric Company and the Kansas Public Utilities Commission to the Circuit Court of Appeals as above stated, a majority of that court held that the motion for judgment on the face of the pleadings should not have been allowed. However, the case was not remanded for trial upon the merits, but was remanded with directions to dismiss the bill of complaint. (Tr. of Rec. 95.)

We especially direct the attention of this court to the dissenting opinion of the Honorable Walter H. Sanborn, presiding judge of the Circuit Court of Appeals (Tr. of Rec. 61, 62), wherein he points out that the order of the Commission was void for the reason that there was nothing in the application of the Electric Company filed with the Commission which could confer jurisdiction on the Commission to change the contract rate between

appellant and the Electric Company. He specifically says (Tr. of Rec. 62):

> *"It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdiction and it is void."*

SPECIFICATION OF ERRORS AND GROUNDS FOR REVERSAL.

The appellant contends that the opinion and decree of the Circuit Court of Appeals, as set forth in the opinion filed by two of the three judges constituting that court, is erroneous and should be reversed on the following grounds and for the following reasons:

1. The petition of the Kansas Gas & Electric Company, filed with the Public Utilities Commission of the State of Kansas, pursuant to which the order of that Commission of March 25, 1918, was entered, was insufficient and did not state necessary facts to confer upon that Commission jurisdiction to enter an order increasing the rates fixed by the contract between said Gas & Electric Company, petitioner, and this appellant.

2. The court erred in holding that to enter a valid order it was not necessary that the Public Utilities Commission find any facts necessary to give the Commission jurisdiction of the particular case in which the order was entered.

3. The court erred in holding that the Public Utilities Commission of the State of Kansas could enter a valid order abrogating the contract between appellant and the Electric Company, appellee, without any reference being made or consideration given, either in the pleadings or the order of the Commission, to the fact that the petitioner was seeking to abrogate and annul the contract

then existing between the appellant and petitioner, Kansas Gas & Electric Company.

4. The court erred in assuming that the Kansas Public Utilities Commission "must have found" allegations in the petition of the Gas & Electric Company to be true, in the absence of any findings of facts whatever being made or recited in the Commission's order.

5. The court erred in holding that it is wholly immaterial that the Commission made no special findings of fact in support of the order in question, granting the relief afforded by the establishment of a new schedule of rates different from those fixed by the 20-year contract between appellant and the electric company.

6. The court erred in holding that the Kansas Public Utilities Commission could lawfully set aside and abrogate the existing contract between appellant and the electric company, without any allegation, consideration or finding that said contract in the respects impaired or abrogated was either unjust, unreasonable, unfair, unjustly discriminatory or preferential, or that said contract in any way affects the public interest or otherwise falls within the regulatory police powers of the state.

7. The court erred in reversing the judgment and decree of the District Court which had awarded appellant, plaintiff below, a permanent injunction against the enforcement of the order of the Public Utilities Commission, entered March 25, 1918.

8. The court erred in its conclusion that the Kansas Public Utilities Commission order in issue

can be sustained or supported by any of the provisions of Section 20 of the Act of the Kansas legislature creating the Public Utilities Commission of that state, and defining its powers and duties.

9. The court erred in holding that the provisions of the Kansas Statute declaring that the orders of the Public Utilities Commission "shall be *prima facie* reasonable unless or until changed or modified by the Commission or in pursuance of proceedings instituted in court, as provided in this act," obviates the necessity of the Commission making any finding of fact to support the order fixing rates, even though the effect of the order is to abrogate an existing contract.

10 The court erred in remanding this cause, with instructions to the District Court to dismiss the complaint; thereby depriving the appellant of its right to a trial upon the merits on the evidence competent to be considered under the issues presented by the pleadings.

11. The court erred in entering a final order disposing of this entire cause, when the only matter before it, for review, was the record made by the District Court in ruling upon a motion for judgment on the face of the record, and no trial having been had in the District Court upon the merits of the issues presented by the plaintiff's petition and complaint alleging that the order was unreasonable, unjust and its enforcement would result in depriving the plaintiff of its property without due process of law.

12. The court erred in directing the District Court to dismiss appellant's bill of complaint upon the decision of an interlocutory motion, without any opportunity for a trial of the case upon its merits under the other issues raised by the pleadings.

ARGUMENT.

In considering this case, it is first necesary to determine whether the entry of the order in question by the Public Utilities Commission was:

(a) A ministerial act; or

(b) An administrative act; or

(c) A legislative act; or

(d) A judicial act.

It cannot be claimed that the Commission was performing only a ministerial duty, because on its face the order states that there were filed, presented and considered certain "pleadings and evidence introduced thereunder."

Therefore, the Commission acted either in an administrative, legislative or judicial capacity. The theory adopted by the majority opinion of the Circuit Court of Appeals manifestly assumes that the act of the Commission was either legislative or judicial in character. That opinion declares that:

> "The Commission *must have found* the allegations in the gas and electric company's petition for the surcharge, that in the generation of electric energy for large consumers, fuel is approximately 75% of the cost of generation, and that the low rates given to these large consumers, in the schedule then in force, were non-compensatory by reason of the large increase of the cost of coal used for the generation of electricity, and that for this rea-

son there should be a surchage sufficient to allow some profit on the investment from the electricity furnished these large consumers." (Tr. of Rec., p. 58.)

It is only legislative acts that do not require some findings of fact, both jurisdictional and substantive to support their validity.

A legislative body is not required to give any reason or basis for its action. It simply declares the law. If any reason or basis can be found, under any possible state of facts, to support the validity of a legislative provision, it is valid on its face; although it may be declared invalid as applying to some particular state of facts established by judicial inquiry.

For example, the legislature may prescribe the minimum rates of fare to be charged by railroad companies for intrastate travel; the law on its face may be valid; it may be valid as to such railroads as may find the rate fixed by the statute compensatory when applied to the business of that particular road.

However, on judicial inquiry it may be established that the rate is confiscatory when applied to the business of a particular railroad, complainant, and as to that particular railroad, or that particular state of facts, it may be declared invalid on judicial inquiry and determination.

The majority opinion from which this appeal is prosecuted proceeds upon the theory that it was not necessary for the Commission to give any reason or basis for the order in question. If that as-

sumption is correct, then the order in question must be accepted as an attempted legislative act on the part of the Commission.

However, this order cannot stand as a legislative act or provision. This, for the simple reason that all the legislative power of the State of Kansas is by the Constitution of that state

> "vested in a House of Representatives and Senate." Art II, Sec. 1, Kansas State Constitution.

The legislative power vested in the House of Representatives and Senate by the Kansas State Constitution cannot be delegated by the legislature organized pursuant to this constitutional provision of that state.

The general rule is well stated in 6 Ruling Case Law, page 165, Sec. 165, as follows:

> "It is a cardinal principle of legislative government that except when authorized by the constitution, as may be the case in reference to municipal corporations, the legislature cannot delegate the power to make laws to any other authority or body."

This court in *Interstate Commerce Commission* v. *Goodrich*, 224 U. S. 194, p. 215 (56 L. Ed. 729), clearly expressed the rule in the following language:

> "The Congress may not delegate its purely legislative power to a Commission, but, having laid down the general rules of action, under which a Commission shall proceed, it

> may require of that Commission the application of such rules to particular situations and *investigation of facts* with a view to making orders in a particular matter within the rules laid down by Congress."

That the majority opinion of the Circuit Court of Appeals presumes for this order of the State Public Utilites Commission the force, effect and character of a legislative enactment, is obvious when they uphold its validity upon the theory that the Commission "must have found" the necessary facts to exist to support their order and decision.

It is the peculiar prerogative of the legislature to enact laws without assigning any reason, or stating any motive to sustain their judgment or to render their enactments valid.

> "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an Act would be constitutional, the courts are bound to presume that such facts exist."
>
> (6 Ruling Case Law, page 112, sec. 112.)

> "On frequent occasions the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of Statutes, *it must be supposed* that the legislature had before it when the Statute was passed, any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of a

> particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established."
>
> (6 Ruling Case Law, page 111, sec. 111.)

The Circuit Court of Appeals for the Sixth Circuit, in the case of *Grainger* v. *Douglas Park Jockey Club*, reported in the 148th Fed. Rep. 513 (Reported and Annotated in A. & E. Ann. Cas., Vol. 8, p. 997), presents a very full discussion of the authorities bearing upon the question that every presumption will be indulged to support the validity of a legislative enactment, and that the legality or constitutionality of a legislative act does not depend upon the recital of any facts or findings or reason for its enactment. The case of In re Spencer, as reported and annotated in A. & E. Ann. Cas. Vol. 9, p. 1105, is a striking illustration of the application of the rule that

> "the presumption always is that an act of the legislature is constitutional; and when the constitutionality of the act depends upon the existence or non-existence of some fact or state of facts, the determination thereof is primarily for the legislature,"

and that no reason or finding need be assigned by the legislative body to support the validity of its action.

That decision was rendered by the Supreme Court of the State of California, in considering the legality of the Child Labor Act passed by the legislature of that state; and the opinion discloses that the statute was upheld upon the theory that the legislature was presumed to have possession of the necessary information essential to support the validity of the act.

However, any attempt to sustain this order as a legislative act by the Commission must fail, for the reason that legislative power can be exercised only by the legislative body prescribed by the constitution.

The above quotation from Ruling Case Law, Vol. 6, Sec. 165, to the effect that legislative power cannot be delegated is amplified in the same authority, and what amounts to an attempt to delegate such authority is explained in the following language:

> "One of the most important tests as to whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature. The generally recognized principle is that a law must be so complete in all its terms and provisions when it leaves the legislative branch of the government, that nothing is left to the judgment of the electors or other appointee or delegate of the legislature. *Where a statute is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be deemed an infringement of*

> *the law, it will be held unconstitutional as purporting to make an improper delegation of legislative power."*
>
> (Ruling Case Law, page 166, sec. 166.)

And the authority proceeds to give certain illustrations of statutes held invalid for incompleteness of the acts as passed by the legislative body.

The rule that the functions of the legislature must be exercised by it alone and cannot be delegated, is well stated by the Missouri Supreme Court in the case of *Merchants Exchange* v. *Knott*, 212 Mo. 616, Opinion 641 (111 S. W. 565), where the court says:

> "The power to bind and loose, to inaugurate or suspend the operations of the law, to say where and when it is the law, is of necessity an inherent and integral part of the law-making power, not to be delegated to or wielded by any commission."

The jealousy with which the rule that legislative power cannot be delegated by the legislature to any other tribunal has been emphasized by the Supreme Court of the State of Kansas, in which jurisdiction this cause arises.

The legislature of Kansas at a special session in 1898 passed a law entitled "An Act creating a

Court of Visitation, declaring its jurisdiction and powers, and providing for proceedings and procedure therein." This act, which was designed to regulate rates and practices by railroads and common carriers, was held unconstitutional and void, for the reason that in the powers conferred upon the tribunal sought to be created by the act, legislative, judicial and administrative functions were commingled and interwoven in a manner violative of the constitutional requirement that the three great departments of government should be kept separate and the powers and duties of each exercised independently of the others.

The decision of the Supreme Court of Kansas holding this act unconstitutional in the case of *State of Kansas ex rel. Godard* v. *Johnson et al.*, 61 Kan. 803, also reported in 49 L. R. A. (O. S.) 662, fully discloses that the law as announced by the highest court of that state is in harmony with the general rule that the legislature cannot delegate its powers to any other body, whether a court, board, commission or other tribunal.

The majority opinion of the Circuit Court of Appeals in this case discloses a misconception of the true theory upon which the validity of these statutes to regulate public utilities are sustained as valid or constitutional.

In every court of last resort in the states of the Union, where the validity or constitutionality of these statutes creating boards or commissions to fix rates and regulate public utilities has been sustained, it has been upon the theory that the legislature in announcing by statute the law of the

commonwealth uttered and published a complete and entire legislative provision. It did not attempt to delegate the power to make rates to any rate commission created by the law.

These acts have been sustained in the several states of the Union upon the theory that under the functions of the board or commission or tribunal created by the statute it was charged with the duty of finding and determining whether or not the necessary facts existed to render the law operative in the particular case under consideration.

If the commission finds that the necessary facts exist to bring the case within the operation of the statute, then the terms of the statue apply. Unless the commission finds that the necessary facts exist, then the statute has no operation. The commission itself has no independent discretion to prescribe rates. The legislature must prescribe the rates. The commission under the law finds the facts, whatever they may be, and the law does the rest.

The language used by the Supreme Court of the State of Florida sustaining the validity of an act creating a public utility commission and prescribing its powers and duties, discloses a very clear conception of the true theory of the only valid method of regulating public utilities by general law. The opinion of the Florida Supreme Court sustaining the Public Utilities Commission statute is found in the case of *State of Florida* v. *Atlantic Coast Line Ry. Co.*, 56 Fla. 617, and is also reported in 47 So. Rep. 969, and annotated in L. R. A., Vol. 32 (N. S.), page 639. We quote from

the opinion of Justice Whitfield in this case, the following:

> "If the regulation or action of an official or board authorized by statute does not in effect determine what the law shall be, or does not involve the exercise of primary and independent discretion, but only determines within defined limits, and subject to review, *some fact upon which the law by its own terms operates, such regulation or action is administrative, and not legislative*, executive or judicial in its nature and effect. The effect and operation of a statute may be made conditional or contingent upon the ascertainment of particular facts, and may be made to depend upon a subsequent event. This principle has been applied in regulations relating to public service, occupations, schools, health, elections, safety, food, game, liquor, taxation, and other public purposes.
>
> In a number of well considered cases it has been distinctly held that where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make, within designated limitations, and subject to judicial review, rules and regulations, or to *ascertain facts*, upon which the statute by its own terms operates in carrying out the legislative purposes, such authority is not an unconstitutional delegation of legislative power."

In the instant case, however, the court below, in its assumption, ascribes to the Utilities Commission delegated legislative power which it could not legally possess.

That Congress or a state legislature cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government.

That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded.

> *Coopersville Co-operative Creamery Co.* v. *Lemon*, 163 Fed. Rep. 145 (Circuit Court of Appeals, Sixth Circuit).

But that Congress or a state tribunal may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear.

The foregoing was the substantial holding of this court in the case of

> *Field* v. *Clark*, 143 U. S. 649, Op. 693; also reported in 36 L. Ed. 294, Op. 310,

in which case this court further says:

> "The proper distinction, the court said, was this (quoting from *In re Locke's App.*, 72 Pa. 491): 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or tends to make its own action depend.'"

It is manifest that the order of the Commission cannot be sustained as the exercise of delegated legislative power; and therefore the Commis-

sion either acted in an administrative or judicial capacity.

It is easy to demonstrate that the Commission did not act in a judicial capacity; or if it did, it must be assumed that the court below held it had the right to do so, and under such assumption (though erroneous) its order is void upon its face. If the Commission was attempting to exercise any judicial prerogative, it must observe certain rules governing the procedure of inferior tribunals.

It is elementary that no judgment of a judicial tribunal can be entered except upon the verdict of a jury or a finding of facts.

In courts of general jurisdiction, all the presumptions are in favor of the jurisdiction of the court to enter the judgment, and the existence of the necessary facts to support the relief granted may be implied. But even in such cases the judgment must not upon its face show that it is entered simply because the tribunal in which it is heard finds that the one party or the other ought to have a judgment and that therefore the judgment is entered.

It is a universal rule in the state courts that judgments can only be entered either "upon the finding" or "upon the verdict."

In the Federal courts under the rules promulgated by authority of the acts of Congress, the form of judgments and decrees being generally prescribed, the rule obtains, especially in equity cases, that the findings of the court need not be preserved on the face of the decree or order. However, this rule has no application whatever to proceedings in inferior tribunals.

In proceedings before a tribunal of the character of a public utility commission, exercising special statutory jurisdiction, *nothing is presumed to be within the jurisdiction of the commission*, unless it distinctly appears from the record made by the tribunal in the particular case before it. It must preserve findings of jurisdiction to justify and prove that it has the power and authority to enter any binding judgment, order or decision in any case of which it takes jurisdiction.

In the leading case of *Galpin* v. *Page*, 85 U. S. 350, Opinion 366 (21 L. Ed. 963), this court announced the general rule in the following language:

> "The rule (regarding presumption as to the existence of jurisdictional facts) is different with respect to courts of limited and special authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averments in the record, or their judgments *will be deemed void on their face.*"

Quoting from Corpus Juris, Vol. 15, p. 842, Sec. 162:

> "There being no presumption in favor of a court of inferior, limited or special jurisdiction, it is usually considered necessary, in order to sustain the proceedings of such a court, that the record should affirmatively show that the court had jurisdiction."

In re Ramsey v. *Huck et al.*, 184 S. W. 966, Op. 968, the Missouri Supreme Court upon this proposition say:

> "Furthermore, the fact must be borne in mind that County Courts are inferior tribunals, not proceeding according to the course of the common law, but confined to the authority given them by statute, and that the grounds of their jurisdiction must appear affirmatively on the face of their records."

In *Sibley* v. *Waffle*, 2 Smith (N. Y.) 180, Op. 189-190, it was held that even where the order of the surrogate recited that he had acquired jurisdiction by the reading and filing of satisfactory proof, and due publication and due service of the order, but without a recital that the publication and service were at the time and in the manner prescribed by the statute, still this simply amounted to a statement by the surrogate that he, in fact, had acquired jurisdiction, and the court held that "he could not acquire jurisdiction by deciding that he had it," but that this was a matter which must affirmatively appear on the record.

To the same effect is the decision *In re City of Buffalo*, 33 Sickles (N. Y.) 362, Op. 366, where the court held that affirmative proof of compliance with the pre-requisites to obtain jurisdiction was absolutely necessary, *and that these jurisdictional facts could not be presumed or inferred, but must appear on the face of the record.*

In *People* v. *Hynds*, 30 N. Y. 470, it was held that an order entered by two commissioners, with-

out the intervention of a third, or notice to him recited in the order, was absolutely void on its face; and that

> "The order must be sufficient on its face. Its defects cannot be helped out or supplied by parol."

Also in the State of New York in proceedings under the statute relating to the drainage of swamps, in the case entitled *In re* Isaac Marsh, Proceedings under Drainage act, reported in 26 Sickles (N. Y. Appeals) 315, the court says:

> "In such proceedings where the rights of property are sought to be interfered with under the right or color of eminent domain, the facts necessary to give the court or officer jurisdiction must appear in the petition, which alone is to be looked to for the facts upon which jurisdiction depends."

This same general rule is laid down in Bailey on Jurisdiction, Vol. 1, Section 129, at pages 107 and 108, in the following language:

> "With respect to statutory courts, the rule is that when a court is created by the legislature with particular powers expressly conferred, the record of their proceedings must affirmatively show a compliance with the statutory requirements, and that as to such matters favorable presumption will not be indulged in, *and the same rule applies to other tribunals exercising judicial powers, though not strictly courts of justice, such as commis-*

sioners of patents, commissioners of land office, municipal council in respect to proceedings authorized by statute, county commissioners in the exercise of such powers, town authorities in respect to laying out roads or exercising statutory functions.

The decisions of such bodies, are in respect to *collateral* attack, governed by the same rules as the judgments of inferior courts. Thus, an inferior board may determine conclusively its own jurisdiction or power by *adjudicating the existence of facts* upon which its jurisdiction or power depends; but when, however, the power depends not upon the existence or non-existence of matters *in pais* to be established by evidence, but upon allegations in a petition, a portion of the record, the question is not the same. *In such case there must appear in the petition the statutory requisites.*"

In Illinois, the case of *Becklenberg* v. *Becklenberg,* 232 Ill. 120 (83 N. E. 423) a divorce case, the Circuit Court failed to preserve in its decree a finding of fact showing residence for a sufficient length of time of the party complainant within the State of Illinois, to give the court jurisdiction—such residence being necessary under the statute to authorize a complainant to maintain a bill for divorce. Upon *direct appeal* from the Circuit Court, the court of general jurisdiction in Illinois, the Supreme Court reversed the decree because of its failure to contain the *necessary finding of fact* that the complainant had resided within the state a sufficient length of time to entitle her to prosecute her suit.

The principle is announced and applied in *Payson* v. *The People*, 175 Ill. 267 (51 N. E. 588), where the authorities on this subject are collected and discussed; also in *The People* v. *Karr*, 244 Ill. 374 (91 N. E. 485), which involved the jurisdiction of inferior tribunals in drainage proceedings.

Also in Illinois, the Supreme Court in referring to the proceedings of the Public Utilities Commission of that state say, in *Public Utilities Commission* v. *Springfield Gas Company*, 291 Ill. 209 (125 N. E. 891):

> "To enable the courts intelligently to review the order of the commission in a rate-making case the findings of the commission should disclose the ultimate conclusions of the commission as to the specific valuations of the elements considered by it in arriving at the fair present vaue of the property."

And in *Public Utilities Commission* v. *B. & O. S. W. R. R. Co.*, 281 Ill. 405 (118 N. E. 81):

> "There is a reason, however, why the Public Utilities Commission was lacking in jurisdiction to make the order here involved. There was no *complaint or finding* that the rule of appellant was not fairly administered as between different shippers but the *complaint and order* were directed against the rule itself."

The majority opinion of the Circuit Court of Appeals, holding that the Kansas Commission, "when making the order complained of made no special findings of fact is wholly immaterial" of-

fers as the basis of its position the suggestion that there is nothing in the Kansas Statute which requires the Commission to make any finding of fact; and the court cites as authority the case of *Detroit etc. R. R. Co.* v. *Railroad Commission*, 171 Mich. 335, 137 N. W. 329, and quote from that case certain language of the opinion of the Michigan court expressing the unfortunate situation in not having before it a finding by the Michigan Commission distinctly stating the ultimate facts found and the factors considered in determining whether or not the rate was reasonable.

It also happens that the Supreme Court of Kansas in the case of *Union Pacific Railroad Co.* v. *Public Utilities Commission*, 95 Kansas 604, 148 Pac. Rep. 667, expressly cites this same Michigan case (*Detroit & M. Ry. Co.* v. *Michigan Railroad Commission*) in support of exactly the contrary view to that presented by the majority opinion from which this appeal is prosecuted.

In the Michigan case referred to, it is true the language quoted therefrom in the majority opinion in this case was used by the Michigan Supreme Court.

However, it is necessary to understand exactly how the Michigan case arose, and what was before the Michigan Supreme Court when it rendered the opinion, and to consider the specific provisions of the Statute of Michigan with reference to the regulation of public utilities and their schedules of rates.

In the Michigan case complaints had been filed before the railroad commission and orders had

been entered substituting certain freight rates for those being charged by the Detroit & M. Ry. Co. The railway company filed a bill in the Circuit Court on the chancery side against the Public Utilities Commission to vacate these orders. The parties who had filed the complaints before the Commission were allowed to intervene as were also other persons claiming to be interested. Answers were filed *and the court heard evidence additional to that which had been reported by the Commission.* Thereupon, the court referred the whole of the testimony to the Michigan Railroad Commission, and that body made a subsequent report to the court that

> "This defendant, the Michigan Railroad Commission, has carefully considered the testimony in said cause and copy of which was transmitted to it, as aforesaid, *and in addition thereto and in connection therewith,* has made a thorough inspection of all the branch roads of said complainant the Detroit & Mackinac Railway Company, affected by said commission orders, etc."

And the Michigan Railroad Commission further reported to the court that it had carefully considered all the evidence and its own investigations and many facts and circumstances including the character of service required, and the expense incident thereto, and that in its judgment the order should not be rescinded, altered, modified or amended.

The Railroad Commission also report to the court:

> "That it is the opinion of this defendant, the Michigan Railroad Commission, that the evidence introduced in behalf of complainant, respecting the cost of operation, should not be taken as in any manner conclusive, for the reason that it admittedly relates to a subject with respect to which there is no known method of computation, which fact clearly appears from the evidence submitted in said cause. That this defendant, the Michigan Railroad Commission, further reports that it has on file the annual report of the complainant, the Detroit & Mackinac Railway Company, for the year ending June 30, 1910, showing a net earning of (8.7%) eight and seven-tenths per cent on the value of its road, as shown by its verified amended bill, which said report was filed with the Michigan Railroad Commission on the 17th day of October, 1910, a certified copy of which is hereto attached and made a part of this report."

The cause then coming on for hearing before the court upon all the evidence which had been originally heard by the Commission and additional evidence heard by the court, and the further report of the Commission upon the reference of the case by the court to that body, the court proceeds to discuss the issues, and uses the language quoted by the majority opinion in this case.

However, under the very same subdivision of the opinion wherein the Michigan Supreme Court expressed its regret that it did not have the as-

sistance of distinct findings of ultimate facts, that court used this language:

> "The Legislature has not fixed the freight rates to be charged by complainant beyond this: it has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases, whether a rate is reasonable and just or unreasonable and unjust, *and to thereupon* make an order in conformity with the facts. The facts being found, it is the Legislature which speaks, approvingly or disapprovingly, as the case may be. *The important business of the Commission with respect to rates is ascertaining facts.*"

It is very important in this case to know that the Kansas Supreme Court in its opinion in the case of *Union Pacific Railroad Co.* v. *Public Utilities Commission*, 95 Kans. 604, Op. 675; 148 Pac. Rep. 667, Op. 673, quote with approval the language of the Supreme Court of Michigan just recited, that

> "The important business of the Commission with respect to rates is ascertaining facts."

A brief reference to the provision of the Michigan Statute showing wherein the laws of that state differ from the Kansas Public Utilities Act, will more satisfactorily show that the learned

judges who rendered the majority opinion of the Circuit Court of Appeals in this case, entirely misapprehended or misconstrued the real position taken by the Michigan Supreme Court in using the language quoted in the majority opinion herein.

Section 22 of the Michigan Statute creating the Michigan Railroad Commission, and defining its powers and duties (being Section 22 of Act 300 of the Public Acts of 1909), prescribes the procedure before the regulating commission upon complaint of any person interested.

Section 26 of the same statute prescribes the procedure for review of the orders of the Michigan Railroad Commission by the courts. This Section (26) after reciting the proper procedure to confer jurisdiction and bring the controversy to an issue, contains this specific language:

> *"Any party to such suit may introduce original evidence* in addition to the transcript of evidence offered to said commission, and the Circuit Courts in chancery *are hereby given jurisdiction* of such suits *and empowered* to affirm, vacate or set aside the order of the commission in whole or in part, *and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law."*

Also by paragraph (c) of said Section 26, the Michigan Statute provides:

> "If upon the trial of said action, evidence shall be introduced by the complainant, which is found by the court to be different from that offered upon the hearing before the

commission, or additional thereto, *the court before proceeding to render judgment,* unless the parties in such action stipulate in writing to the contrary, *shall transmit a copy of such evidence to the commission,* and shall stay further proceedings in said action for fifteen days after the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may alter, modify, amend or rescind its order, etc., *and shall report its action thereupon to said court within ten days of the receipt of such evidence.*"

It is clear therefore, that under the peculiar provision of the Michigan Statute, when a suit or action is begun in the chancery court, by which the order of the Commission is attacked, the procedure prescribed by the statute differs in at least three material respects from that which obtains under the Kansas law in like situations, namely:

(a) The Michigan court sits as an appellate tribunal to consider the Commission's orders and findings upon, first: a transcript of the evidence heard by the Commission, and second, may also try the issues *de novo,* and hear additional evidence, subject however, to the mandatory provisions of the statute requiring recommitment of the whole case to the Commission for further findings; and

(b) The Michigan Railroad Commission thereupon becomes an aid or department of the court itself, and the additional evidence is by the court referred to the Commission, which thereupon pro-

ceeds substantially as would a master in chancery in ordinary proceedings in chancery; and

(c) The court enters its decree as an original finding and determination of the controversy, not necessarily as an affirmance or reversal of the order of the Commission, but independent of the action of the Commission, the court may enter a decree determining all of the issues involved, and the chancery court is specifically clothed with jurisdiction by the statute

> "To make such other order or decree as the court shall decide to be in accordance with the facts and the law."

We submit therefore, that no support is to be found in the decision of the Michigan Supreme Court in the case cited in the majority opinion of the Circuit Court of Appeal for its conclusion "that the Commission when making the order complained of, made no special findings of fact is wholly immaterial."

We contend that it is an elementary rule of law that the orders of a Public Utilities Commission are only valid when on the face of the order it appears that, (1) the Commission had jurisdiction in the particular case to enter an order, and (2) that the necessary facts exist which the statute prescribes as conditions precedent to the Commission taking jurisdiction for the purpose of entering an order substituting new rates for those already in force; and that the application of this elementary rule does not depend on whether or not

the particular statute creating the Commiss' and defining its powers, by express language requires the Commission to make such findings, or whether the act is silent in that regard. Only such orders of the Commission are valid as those which do on their face recite the necessary jurisdictional facts to sustain the acts of the Commission in taking jurisdiction of the particular case.

The Commission being an inferior tribunal, not possessing legislative power, and deriving its just powers from special statutory enactments, exercising jurisdiction not in the course of the common law as courts of general jurisdiction, the fundamental rules governing the jurisdiction of inferior tribunals obtain; and their orders are void in the absence of necessary findings of fact to support the particular order entered.

The same rule obtains in the state of Kansas, where this case originates. The Supreme Court of Kansas, discussing this elementary principle, quote with approval the language above recited from the Michigan Supreme Court in the opinion in *Union Pacific R. R. Co.* v. *Public Utilities Commission*, 95 Kan. 604, Op. 675, which concludes with the significant statement:

> "It (the Legislature) has confided to the Railroad Commission *the power*, with the duty, *to ascertain*, in proper cases, *whether a rate is reasonable and just* or unreasonable and unjust, *and to thereupon make an order* in confirmity with the facts. The facts being found, it is the Legislature which speaks, approvingly or disapprovingly, as the case

may be. *The important business of the Commission with respect to rates is ascertaining facts.*"

It must therefore be conceded that the order in question cannot be sustained as an exercise by the Kansas Public Utilities Commission of any judicial function or prerogative. It is void on its face if it must be supported as a judicial act.

In any event the order in question in this case cannot be treated as a judicial decision for the reason that it is intended to be operative in the future; it does not relate to past or existing conditions. It does not enter any judgment for relief for any present or past wrong or grievance. The Legislature deals with the future, the courts deal with the past and the present.

It being demonstrated that the order cannot be sustained either as a ministerial act by the Commission, nor as the exercise of legislative authority, nor as the exercise of judicial power, we arrive at the only theory upon which any order of any public utilities commission can be sustained, namely: that the Commission acts purely as an administrative agent, exercising administrative functions within the powers conferred upon it by the statute.

It is clear, from a consideration of the provisions of the Kansas statute in question that the Legislature never intended to delegate its legislative powers, neither did the Legislature ever intend to create a commission with judicial powers. It if had done so the law itself would be

void and in violation of the Kansas Constitution. *Goddard* v. *Johnson,* 61 Kan. 803.

The statute creating this Utilities Commission, and under which it functions, is a statute complete in itself, and if applied and construed and followed according to its terms, is valid and constitutional. In the court below we were charged with insisting that the Public Utilities Act under which the Utilities Commission operated is unconstitutional.

We have never contended that the Act itself is unconstitutional; we do not contend that now. The Supreme Court of Kansas has held that it is constitutional and valid. It has been held valid because it has been held to be an Act complete in itself, declaring the law and clothing an administrative tribunal, namely: the Public Utilities Commission, with the duty of determining the existence or non-existence of facts in proper proceedings which make the law operative and applicable.

If any other construction than this be placed upon the Kansas statute, we have contended and now contend that the Act would be unconstitutional and invalid.

And we contend now that to place upon this statute the construction which the majority opinion of the Circuit Court of Appeals would give it, would render the Act invalid and unconstitutional for reasons heretofore discussed in this brief.

But we are not concerned in this case with the question of the constitutionality or invalidity of the Public Utilities Act, as a statute; we are only concerned with the validity of the order appearing

on the second page of this brief. We contend that this order is void under the admitted facts appearing on the face of the record. The District Court held that the order was void for reasons stated in the opinion, which were summarized by that court in its opinion appearing in the transcript of the record herein at page 39, as follows:

> "(1) Because there is neither found nor stated therein any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state.
>
> (2) For the reason no facts are found or stated in the order of the Commission sustaining, or tending to sustain the exercise of its statutory powers and functions as prescribed in the Public Utilities Act; and
>
> (3) Further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates or charge for service charged other members of the public, or other justification or excuse for the making of the order, except the mere caprice or whim of the Commission, based on the ground the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in future be made by the Commission."

Circuit Judge Sanborn, in the dissenting opinion declaring the order in question void, has used the following language in supporting his conclusions:

> "When carefully analyzed and reduced to its lowest term the only ground for the raising of the contract rates stated in the petition of the Gas & Electric Company and the only basis for the order of the Commission raising them upon that petition is, in my opinion, that the contract rates which the petition shows were so much more profitable during the first years of the term of the contract than it anticipated, that in December, 1916, the Gas & Electric Company filed with the Commission and asked approval of a schedule of reduced rates (affecting only its small consumers, 17,000 in number) became in 1917 so much less profitable that it filed its petition for this raise. The petition does not show what profit the Gas & Electric Co. derived from the contract rates during the years prior to 1917. It does not show that the contract rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdiction and is void."

Yet the majority opinion of the Circuit Court of Appeals and from which this appeal is prosecuted amounts in effect to putting an unconstitutional construction upon a valid statute of the state of Kansas, with the result and effect of depriving appellant of its property, without due process of law. In this connection it will be remembered

and borne in mind that the due process clause applies to and is a limitation upon every department of government, whether judicial, legislative or executive, and in whatever manner or by whatever tribunal the exercise of governmental powers may be attempted.

It is important therefore at this time to observe the specific provisions of the Public Utilities Commsision Act of the State of Kansas. It is only necessary to quote the particular sections of that statute which apply to and govern the issues involved in this case.

Section 13 of that Act provides:

> "13. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, *and if after full hearing and investigation* the commission *shall find* that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations *as shall be just and reasonable*. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any

of the provisions of this act or of *the orders of this commission*, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, services or acts, and to make such order respecting any such changes in such regulations, measurements, practices, service or acts *as shall be just and reasonable*. Whenever, in the judgment of the Public Utilities Commission, public necessity and convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions."

Section 14 of that Act provides:

"*Upon a complaint in writing* made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier *are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both*, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the pub-

lic is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such public utility or common carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, *the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary.* The commissioners may, upon their own motion, and without any complaint being made, *proceed to make such investigation,* but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such commission shall have power to make or to hold may be made or held before any one or more commissioners, and all investigations, hearings, decisions and orders made by a commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the Public Utilities Commission, when approved and filed by such commission and filed in their office, and the commission shall have power to require such public utilities and common carrier to make such improvements and do such acts as are or may be *required by law* to be done by such public utility or common carrier."

Section 16 of that Act provides:

"If upon such *hearing and investigation* the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, *are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas*, the Public Utilities Commission shall have the *power* to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules *as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found* that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public is in any respect *unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the state of Kansas*, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act *as they find and determine to be just, reasonable and necessary*. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or estab-

lished, shall be reduced to writing and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect."

The foregoing are the only sections that are important in the consideration of this case; they are the only sections of this statute under which any valid order could have been entered by the Public Utilities Commission in any proceeding or upon any state of facts to change the contract rates existing between the Electric Company and the Street Railway Company.

The majority opinion seeks to give some application to Section 20 of the statute in question, which reads as follows:

"Sec. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public untility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such

public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications and all rules and regulations shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection."

It is implied from the reference by the court to this section that inasmuch as the Commission is given authority to approve a schedule of rates and charges, which may be filed by public utilities, that therefore they may by virtue of this section refuse to approve the schedule filed by the petitioner and fix other and different rates and charges which they shall determine to be just and reasonable, without any previous hearing, investigation or determination.

In the instant case it is patent that this proceeding before the Public Utilities Commission was not governed by the provisions of Section 20.

The rates filed by the Kansas Gas and Electric Company with the Commission were not the rates which the Commission established. The Commis-

sion declined to approve the rates prescribed in the schedule of the petitioner. On the contrary, the Commission entered upon a hearing pursuant to the petition filed by the Electric Company, heard evidence, and entered the order fixing entirely different rates from those petitioned for.

We earnestly insist that the conclusion reached by Circuit Judge Sanborn in the dissenting opinion is manifestly correct, that the petition which the Electric Company filed did not confer any jurisdiction on this Commission to establish rates which were to apply to and modify and abrogate the contract rates fixed in the contract with appellant.

There is not a suggestion in the petition of the Electric Company for authority to add surcharges to its rates, that there was in fact any contract in existence between it and appellant. The contract is not referred to. The petition simply asks authority to add surcharges to petitioner's rates.

There is nothing on the face of the petition to indicate to the Commission that the Electric Company had enered into any contract with the appellant for any term of years at any stipulated rate of charge for electric current.

Surely, therefore, the Commission had no pleading before it giving it jurisdiction to enter any order abrogating the contract rate which appellant contends has never been legally disturbed, modified or abrogated.

Just how the utilities commission could enter an order which abrogated a contract between the Kansas Gas and Electric Company, Appellee, and

the Wichita Railroad and Light Company, Appellant, without there appearing either in the petition or any other pleading before the Commission any suggestion or intimation that such contract was in existence, is certainly anomalous.

At the very threshold of the case, therefore, as Circuit Judge Sanborn so tersely and clearly presents in his dissenting opinion, it is patent on the face of the record that the jurisdiction of the Commission had never been invoked to investigate or determine the reasonableness or justness of the contract rates which the appellee Electric Company claims have been abrogated by the order involved herein.

Surely the Commission by entering a blanket order giving a public utility the right to add surcharges to its rates, cannot be presumed to have considered or adjudicated any issue as to whether or not the contract rates were reasonable. If there was nothing in the petition presenting to the Commission the fact that a contract was in existence, then there was certainly no jurisdiction in the Commission to enter an order abrogating such contract.

To hold otherwise would be to violate the fundamental principle that a party in interest has a right to have his day in court or his opportunity to be heard before his property can be jeopardized, destroyed or taken from him.

On the face of the record in this case, the Electric Company has secured an order abrogating its contract with appellant and requiring appellant to pay large additional compensation for electric cur-

rent above that provided in its solemn and binding contract, which had been in existence before the Commission was organized, and which does not expire until 1930, without appellant ever having had any opportunity to join issue upon any allegation questioning the reasonableness of such contract rates.

We presume that appellee contends that the passage of the Public Utilities Act by the Legislature of the State of Kansas operated automatically to overthrow and annul all existing contracts between Public Utility corporations, without any consideration being given to the elementary rule that there must be first an adjudication and finding that the enforcement of such contract rates in the future would affect the public weal, or justify the exercise of the police power of the State in the public interest.

The Supreme Court of the State of Kansas, in *Kaul* v. *Telephone Co.*, 95 Kan. 1, a case involving facts very similar to those here involved, held that:

> "The contract in question was made long before the act referred to was passed, and was in force when the Public Utilities Commission came into existence, and while that Commission is vested with broad regulatory powers it is not shown nor claimed that it has found the contract rates to be unreasonable. Granting, without deciding, that the Commission has the power under the law to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the

> power, nor that they have been presented to it for its consideration. *The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the Public Utilities Commission abrogate the contract.* In any event, rates previously agreed upon between utilities and patrons will continue in force *until the Commission has found them to be unreasonable,* and has prescribed other rates."

The Kansas Public Utilities Law, chap. 238 of the Session Laws of Kansas, 1911, under which the Commission assumed to act in making the order herein complained of, in section 16 specifically provides that before the Public Utilities Commission shall have power to fix and establish new rates and order such new rates substituted for existing rates, the Commission *must find* existing rates to be "unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or otherwise in violation of the provisions of this act or any of the laws of the State of Kansas."

Section 13 of the act contains substantially the same provision.

Section 16 further provides that *if existing rates are* by the Commission *found* to be discriminatory, unjust, unreasonable, etc., *then* the Commission shall have power to order substituted therefor such rates as "it *shall find* and determine to be just, reasonable and necessary."

Section 16 of the act also provides that all orders of the Commission

> "shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, *unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect.*"

This section clearly announces the intent of the legislature that the Commission must incorporate its findings within its written order, otherwise a public utility dissatisfied with the order could not commence an action in a court of proper jurisdiction "to set aside the findings" of the Public Utilities Commission. A finding which has not been made, or which is not known, or disclosed by the order, cannot be "set aside." Neither can a court review and correct the same. It is, therefore, clearly apparent that the orders of the Commission must on their face disclose the findings, orders and decisions of the Commission in order that they may be reviewed, corrected or set aside by a court of proper jurisdiction. Otherwise the utility whose rights are invaded has no remedy, and the order is void under the Kansas statute because of the omission of such findings.

We emphatically declare that it is not our position that the state was without power to abrogate the contract rates in proper cases and by appropriate proceedings, but we do insist that the only basis or justification for the power of the state to abrogate such contract rates would obtain *when it was found and determined* that the public interest required such action and procedure.

The case referred to in the majority opinion of the Circuit Court of Appeals as conclusively determining the right of the State of Kansas to enact a law abrogating contract rates in force by public utilities, namely:

Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, clearly has no application to a case where the record shows that the contract rates were not challenged by the pleadings; surely it has no application to a case where there is no finding or reference in the order or decision of the Utilities Commission that it even considered the question of the reasonableness of the contract rates.

On the contrary, this court there expressly held that the private contract rights obtaining under existing contracts would yield only to the public welfare, where the same is declared and defined, and the two conflict, and that exact language is quoted from the Union Dry Goods Co. case in the majority opinion of the Circuit Court of Appeals.

In all the cases where contract rates have been abrogated by an order of the Public Utilities Commission, there has been presented to and investigated by the Commission the important question

of whether or not the existence and future application of these contract rates in any manner affect the public welfare.

We therefore submit:

That the order entered by the Kansas Public Utilities Commission, which is manifestly nothing more nor less than a declaration by the Commission that according to its caprice, or whim or judgment, the appellee, Electric Company, shall be allowed to add surcharges to its rates increasing as the quantity of current consumed per month by its respective consumers increases, is void upon its face.

That as pointed out by Judge Sanborn in his dissenting opinion, there was no sufficient averment in the petition filed by the Electric Company with the Utilities Commission as could give that Commission jurisdiction to abrogate the contract rate between the Electric Company and the appellant.

That the complete failure of the order in question to show any consideration of the element of public welfare in connection with the existence or modification of the contract rate between the Electric Company and the appellant, is conclusi against the claim of the Electric Company that it can, by virtue of this order, declare and effectuate any impairment or abrogation of the agreed rates prescribed by its contract with appellant.

That the protection of the due process clause of the Federal Constitution is lost to appellant, if the

Kansas Public Utilities Commission can, by a blanket order, without even referring to the contractual relationship involved, deprive appellant of its rights under its contract with the Electric Company, without, so far as the record shows, even giving appellant "its day in court" to be heard in this drastic confiscation of its property and contractual rights.

That in any event, appellant can not in this summary way be deprived of its right to a trial upon the merits of its case in the district court, by the entry of a final judgment upon an interlocutory motion not involving any of the merits of the controversy.

Respectfully submitted,

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WM. R. STANS
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No. [redacted]27

In the

Supreme Court of the United States

October Term, [redacted] 1922

THE WICHITA RAILROAD & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS & ELECTRIC COMPANY, *Appellees.*

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

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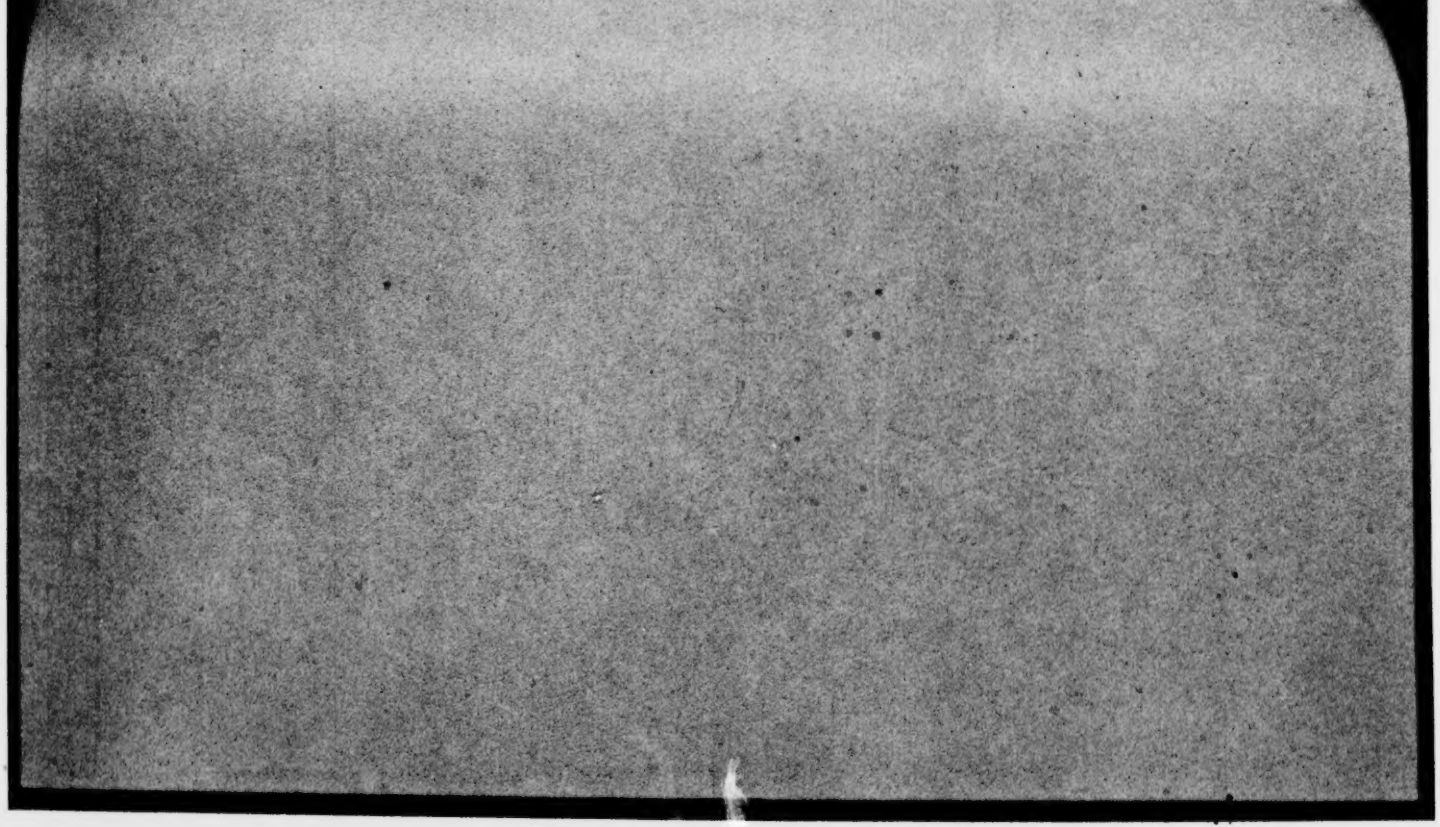

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In the

Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS & ELECTRIC COMPANY, *Appellees.*

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

No. 217.

STATEMENT.

This suit was filed in the District Court of the United States for the District of Kansas on April 24, 1918, and was brought by the Wichita Railroad & Light Company, appellant, against the Public Utilities Commission of the State of

Kansas, appellee, to restrain the Commission from putting into effect an order authorizing Kansas Gas & Electric Company to add a surcharge to certain of its rates for electricity furnished consumers in the State of Kansas. (Pages 2 to 20, transcript of record.)

A temporary restraining order was granted by the court restraining and enjoining said Public Utilities Commission and its members from enforcing said order (page 25).

On May 14, 1918, the Public Utilities Commission filed its answer to the bill of complaint (page 27).

On May 25, 1918, a stipulation was filed in the case providing, among other things, that the restraining order should continue in force as a temporary injunction until the further order of the court, and that upon the final hearing the transcript of the evidence taken before the Public Utilities Commission at the hearing of the application for said surcharge might be used by either side, subject to objection as to competency, relevancy, or materiality, and that either side might introduce such further competent, relevant and material evidence as it might desire (page 26).

On November 13, 1918, appellant filed its motion, praying for a final judgment and decree upon the pleadings consisting of the bill of complaint and answer and on the said stipulation (page 28).

On February 7, 1919, Kansas Gas & Electric Company filed its application for leave to file its intervening petition herein, which application was

granted by the court (page 21), and said intervening petition was filed on the said February 7, 1919 (page 22).

Thereupon and on the 5th day of March, 1919, appellant filed its motion for the entry of a final judgment upon said intervening petition, the bill of complaint, the answer of the Public Utilities Commission, and upon said stipulation and upon the motion theretofore filed by appellant for final judgment and decree against the said Public Utilities Commission (page 30).

On June 6, 1919, the trial court, by its judgment and decree, sustained the said motions for judgment upon the pleadings, and upon said stipulation, the court in said judgment and decree finding that the said order of the Public Utilities Commission authorizing and permitting Kansas Gas & Electric Company to add a surcharge to its existing rates for electricity supplied by it to its consumers in the State of Kansas, is as to the appellant void and unenforceable for reasons hereinafter stated (page 42).

The court further found that the said temporary injunction should be made permanent, perpetually restraining and enjoining appellees from enforcing or attempting to enforce as against appellant the rates or surcharges authorized and permitted by the said order. Judgment was entered in accordance with said findings sustaining the said motions of the appellant for judgment on the pleadings, adjudging said order to be null and void as against appellant and perpetually restraining and enjoining appellees from enforcing or attempt-

ing to enforce as against the appellant said order of the Public Utilities Commission. From this decree the appellees appealed to the United States Circuit Court of Appeals for the 8th Circuit, in which court on January 17, 1921, as of July 15, 1920, a decree was entered, reversing the said decree of the District Court and remanding the case to the District Court with instructions to dismiss the complaint (page 95).

The opinion of the United States Circuit Court of Appeals, together with the dissenting opinion of Judge Sanborn, appears in the transcript of the record beginning at page 53 and is reported in 268 Federal Reporter, page 37.

The undisputed facts set out in the pleadings and in the stipulation and upon which said decrees were entered are as follows:

Appellant is a corporation organized and existing under the laws of the State of West Virginia and is a citizen and resident of that state, and is authorized to do business in the State of Kansas, and is engaged in the business of operating a street railway within the City of Wichita, Kansas (page 2).

Appellee, Kansas Gas & Electric Company, is a corporation organized and existing under the laws of the State of West Virginia, and is authorized to do business in the State of Kansas, and is and was at the times hereinafter mentioned, engaged, among other things, in the business of furnishing electric light and power to consumers in the State of Kansas, and particularly in the City of Wichita, in said state (page 22).

Appellee, the Public Utilities Commission of the State of Kansas, is a board or commission created and existing under and by virtue of an act of the Legislature of the State of Kansas passed in the year 1911, and being Chapter 238 of the Laws of Kansas of 1911. The said appellee Commission is and has been since the passage of said law, vested with full power, authority and jurisdiction to supervise and control public utilities, doing business in the State of Kansas, and to fix and regulate the rates to be charged by said utilities for service, said power, authority and jurisdiction having been delegated by the State of Kansas by said act of the Legislature to said Public Utilities Commission (page 22).

That the amount in controversy in this suit exceeds the sum of $3,000.00 (page 2).

On May 2, 1910, appellee, Kansas Gas & Electric Company, and appellant entered into a written contract, by the terms of which for a period expiring November 30, 1930, said appellee agreed to furnish and appellant agreed to receive and pay for, electrical capacity and energy necessary in the operation of the street railroad system of the appellant in the City of Wichita, Kansas, and said contract fixed the rates to be paid by appellant for said service. That since the date when said contract became effective and up to and including the filing of the electric company's intervening petition herein, said appellant has received from said electric company the electrical capacity and energy necessary for the operation of said railroad (page 22).

A copy of said contract is set out in the transcript of the record, beginning at page 8.

That prior to the 25th day of March, 1918, Kansas Gas & Electric Company filed with the Public Utilities Commission its application for permission to add a surcharge to certain of its rates for electricity, a copy of which application is attached, as an exhibit, to the bill of complaint (page 18).

That in said application said electric company represented that its rates for electricity, then in force, were based upon the cost of producing and distributing electrical energy during normal times and when made were intended to yield, and did yield, a reasonable return only upon the value of its property used and usable in producing and distributing electrical energy in the State of Kansas. That on account of the unusual conditions then existing due to the fact that the nation was at war, the cost to said company of producing and distributing electrical energy had increased enormously, principally on account of the increased cost of fuel and labor; that if the company's existing rates were continued in effect under conditions then existing, the result would be to deprive it of a reasonable return upon the value of its property, and Kansas Gas & Electric Company prayed the Commission for an order authorizing it to add a surcharge to its existing rates sufficient to reimburse it for the increase in the cost of fuel, due to said war conditions (page 23).

It was alleged in said application that the cost to the said electric company of producing electrical energy for the year ending December 31, 1917, was approximately 100% greater than the cost of production in the year 1914, at which time the company had filed its schedule of rates with the Public Utilities Commission, and at which time normal conditions prevailed. That on account of such increase in the cost of production and distribution, the net income of the Electric Company for the year ending December 31, 1917, was approximately $190,000.00 less than it would have been if the electric company had been able to operate under the normal conditions existing in 1914. That if the electric company's existing rates were continued in effect, the result would be disastrous to the company, depriving it of a reasonable return upon the value of its said property, making it impossible to find a market for the securities which it must issue and sell in order to provide funds with which to make improvements, additions and betterments, which would be necessary if it was to furnish proper and adequate service to the communities in which it operated. The application thereupon asked that in order to increase the net earnings of the electric company to an amount sufficient to offset the loss resulting to it from said war conditions an order be entered by the Commission, authorizing the company to add to its existing rates the surcharge mentioned in the application. The application further stated that there were approximately 19,900 consumers of electricity served by the electric company. The

proposed surcharge did not effect consumers using 100 kilowatt hours or less, per month, and therefore 17,000 of the said total number of consumers would not be affected by the order. In apportioning the surcharge equitably among the remainder of the consumers, the application stated that the applicant had taken into consideration the fact that in the generation of electrical energy for large power consumers, fuel is approximately 75% of the cost of generation, and that therefore a surcharge which has for its purpose the reimbursement of the electric company for increase in the cost of fuel should be so adjusted that the surcharge would increase in proportion to the amount of energy consumed. The applicant, therefore, prayed that the electric company be authorized to add to its existing rates for electricity in the State of Kansas until the further order of the Commission, the following surcharges:

For the first 100 kilowatt hours, per month, no surcharge.
For the next 1000 kilowatt hours, per month, 12 mills per kilowatt hour.
For the next 10000 kilowatt hours, per month, 9.5 mills per kilowatt hour.
For all excess kilowatt hours, per month, 3.5 mills per kilowatt hour (page 18).

After the filing of said application, appellee, Public Utilities Commission, after due and legal notice to all parties concerned, including the appellant, entered upon the hearing of said application (pages 3 and 23).

That at said hearing evidence was introduced in support of and in opposition to said application, and the Commission, after full investigation, and being fully advised in the premises, on the 25th day of March, 1918, entered its order, by the terms of which it found that the electric company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas until the further order of the Commission, the following surcharges:

For the first 100 kilowatt hours, per month, no surcharge.
For the next 14900 kilowatt hours, per month, 1 mill per kilowatt hour.
For the next 20000 kilowatt hours, per month, 2 mills per kilowatt hour.
For all excess over 35000 kilowatt hours, per month, 3 mills per kilowatt hour (page 23).

The said order further authorized and permitted the electric company to add to its existing rates for electricity supplied by it to consumers in the State of Kansas the said surcharge until the further order of the Commission. Said surcharge order has not been revoked or modified and was at the time of the institution of this suit and the filing of the intervening petition herein in full force and effect (page 23).

A copy of said order is attached, as an exhibit, to the bill of complaint (page 7).

The intervening petition alleged that since the surcharge order became effective, to-wit: May 1, 1918, and up to and including December 31, 1918,

the electrical energy furnished by the electric company to the appellant amounted to 3,179,689 kilowatt hours, and that the surcharge due from the appellant to the electric company under said order of the Public Utilities Commission on account of the energy so furnished amounted to $9,088.18. The intervening petition further alleged that Kansas Gas & Electric Company has an interest in the matter being litigated in this case, it being the party entitled to the benefits to be derived from said order, and being the real party injured, and damaged, by the granting of said injunction and prayed that said injunction be dissolved and that it be permitted to enforce the said order against appellant (page 25).

The bill of complaint alleged, as grounds for the injunction prayed for, that the said order of the Public Utilities Commission was invalid and void for the following reasons:

1. The Public Utilities Commission of the State of Kansas was without jurisdiction to hear or determine any question relative to the appellant, for the reason that appellant conducts its business wholly within the city of Wichita, and is not subject under the public utilities law of Kansas to control or regulation by the Public Utilities Commission.

2. That the Public Utilities Commission was without power or authority to change or modify the written contract of May 2nd, 1910, between appellant and the Electric Company; said contract having been entered into prior to the passage of

the public utilities law of the State of Kansas. Said contract is protected by Section 10 of Article 1 of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts. That the public utilities law of the State of Kansas, if applicable to said contract, is repugnant to said provision of the Constitution and is, therefore, null and void.

3. That the added charges fixed by the order of the Public Utilities Commission of March 25th, 1918, are preferential and discriminatory against the appellant because the rates were fixed upon a scale increasing as the volume of consumption increased.

4. That the rates fixed by said order are unreasonably high and are confiscatory and result in the taking of the property of appellant without due process of law, thereby depriving appellant of the equal protection of the law, in violation of the 5th and 14th Amendments of the Constitution of the United States (pages 3, 4 and 5).

The trial court, however, in its decree sustaining the motion for judgment on the pleadings, found the said order of the Public Utilities Commission of March 25th, 1918, to be void and unenforceable against the appellant for the following two reasons, neither of which was pleaded in the bill of complaint:

> "(1) Because there is neither found nor stated in said order any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when

the Public Utilities Commission came into existence as a creature of the state.

(2) For the reason that no facts are found or stated in the order of the commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the Public Utilities Act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the commission based on the ground that the net revenues of intervener will be temporarily decreased if certain other charges in rates shall in the future be made by the commission" (page 43).

The court in its written opinion said:

"A reading and consideration of the briefs and arguments of solicitors for the respective parties, and a reference to the many adjudicated cases cited, and quoted from leaves no room for doubt whatever but that contracts between public utility corporations, similar to that involved in this case, are not in all things afforded such full and complete protection against impairment of their obligations by subsequent legislative enactment of a state, under Article 1, Section 10, of the National Constitution as is afforded purely private contracts between individual citizens or corporate bodies."

The court further held that contracts of this character are made in view of existing law and the rights of the state to impair the obligation of contracts in the exercise of its reserve police power (page 37).

From this judgment and decree appellees, The Public Utilities Commission and Kansas Gas and Electric Company appealed to the United States Circuit Court of Appeals. The appellant Wichita Railroad and Light Company did not appeal therefrom. The Circuit Court of Appeals reversed the cause and from that court's decree appellant has brought its appeal to this court.

APPELLEES' BRIEF AND ARGUMENT.

I.

Contract rates not protected by Article 1, Section 10 of the Constitution of the United States.

The bill of complaint alleges that the regulation and change of rates fixed in the contract between appellant and Kansas Gas and Electric Company are not within the police power of the State of Kansas and that the contract is within the protection of Section 10, Article 1, of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts.

The United States District Court ruled against appellant on this contention. That court expressly held that the Public Utilities Commission had the power to change rates fixed by contract. The court in its opinion said:

> "And for this reason, all contracts are made in view of existing law, and the right of the state to impair the obligation of contracts in the exercise of its reserve police power becomes a part of the contract when entered into. Therefore, the exercise of such right is excepted from the general prohibition found in Article I, Section 10, of the Constitution against the impairment of existing contracts by legislative enactment" (page 37).

On the appeal of this case to the United States Circuit Court of Appeals that court in its opinion said:

> "That the effect of the order would be to nullify the contract, theretofore entered into by the parties does not make the order obnoxious to the constitutional provision, prohibiting states to enact laws, impairing the obligation of contracts, has been conclusively determined in *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372. The court in its opinion said:
>
> 'Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.
>
> That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court.' Citing a number of authorities.
>
> The same conclusion was reached in *Producers' Transportation Company* v. *Railroad Commission*, 251 U. S. 228, where the court said:
>
> 'That some of the contracts before mentioned were entered into before the statute was adopted or the order made, is not material.'
>
> This disposes of the claim that the Commission was without authority to make the order, to affect the contract of the plaintiff because it was made before the Act creating the Public Utilities Commission was enacted.

In *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co*, 275 Mo. 529, 204 S. W. 1074, it is held:

Rates fixed by contract with a public service company for electricity to be supplied, are superseded by rates fixed by the Public Service Commission, since the police power of the State cannot be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a *per curiam* opinion upon the authority of *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 251 U. S. * * *" (page 58).

That this constitutional question has ceased to be real or substantial is shown conclusively by the decisions of this court in many cases, of which perhaps the most recent are:

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309.

Kansas City Bolt and Nut Co. v. *Kansas City Light & Power Company*, 252 U. S. 571, 64 L. ed. 721.

The Kansas City Bolt and Nut Company case came to this court by writ of error from the Supreme Court of Missouri. It appears from the report of the case in that court (275 Mo. 529) that the case involved the alleged rights of the Bolt and Nut Company under a contract entered into between the Bolt and Nut Company and the Power Company on September 6, 1912. By the terms of this contract the rates to be charged for electric energy for the operation of the manu-

facturing plant of the Bolt and Nut Company were fixed for the period of the contract. The Public Service Commission of Missouri was established by an act of the legislature of 1913. On April 17, 1917, the Public Service Commission made an order establishing a schedule of rates which the Power Company should be permitted to charge for electric energy at Kansas City, Missouri. The cost to the Bolt and Nut Company for electrical energy under the rates thus established by the Commission were higher than the rates fixed by the contract. The Supreme Court of Missouri held that the Public Service Commission, in the exercise of the police power of the state, had the power to supersede the rates fixed by this contract by establishing a general schedule of rates for electric energy although the contract was entered into before the Public Service Commission was established. This decision was affirmed by this court in a memorandum opinion upon authority of the Union Dry Goods Company case.

But counsel say in their argument (page 61):

> "We emphatically declare that it is not our position that the state was wthout power to abrogate the contract rates in proper cases and by appropriate proceedings, but we do insist that the only basis or justification for the power of the state to abrogate such contract rates would obtain *when it was found and determined* that the public interest required such action and procedure."

And again (page 45):

> "The Commission, being an inferior tribunal not possessing legislative power and deriving its just powers from special statutory enactments, exercises jurisdiction not in the course of the common law as courts of general jurisdiction, the fundamental rules governing the jurisdiction of inferior tribunals obtain; and their orders are void in the absence of necessary findings of fact to support the particular order entered. The same rule obtains in the State of Kansas where this case originates."

Here we have counsel's statement of what they conceive to be the real question in this case. We have then only for determination what seems to us to be a question involving solely a construction of the statute of the State of Kansas creating the Public Utilities Commission and prescribing the conditions under which and the manner in which it may exercise the power of rate-making.

The construction of a state statute does not itself present a federal question.

> *Knop* v. *Monongahela River Consolidated Coal and Coke Company*, 211 U. S. 485, 53 L. ed. 211.

If in this situation this court will retain jurisdiction of this case we submit the following suggestions in support of the decree of the United States Circuit Court of Appeals, from which this appeal is taken.

II.

The order of the Public Utilities Commission is not invalid because it contains no findings of facts.

The decree of the trial court was based upon the failure of the Commission to recite in its order the jurisdictional facts upon which the order was based. The District Court said:

> "Coming now to the order of the Commission itself, it is found no jurisdictional facts calling its statutory powers into action are stated; no finding of unreasonableness of the contract rates existing between the parties is made; no finding the same are in their nature discriminatory, unreasonable, unjust, or the carrying out of the contract will in any manner, form or (*way*) injuriously affect public interest, public health, public safety, public convenience, or any other finding except the mere will of the Commission that same will be surcharged." (page 39).

And again:

> "I am convinced the order of the Commission in this case is void on its face and of no effect, for two reasons: (1) Because there is neither found nor stated therein any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state; (2) for the reason no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of

its statutory powers and functions as prescribed in the Public Utilities Act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commsision based on the ground the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in future be made by the Commission" (page 39).

An examination of the Public Utility Law of the State of Kansas will, we think, show clearly that the Public Utilities Commission was authorized upon the facts stated in the pleadings to make the order in question and thereby to change the rates fixed by contract to be paid by appellant, and that the validity of the order of the Commission in nowise depends upon findings of fact set out in the order. The Public Utility Law of the State of Kansas was enacted in 1911, and the sections here quoted are from Chapter 238 of the Session Laws of 1911. The following sections of that act are deemed necessary to a decision of the case:

"Section 1. The Board of Railroad Commissioners of the State of Kansas is hereby constituted and created a Public Utilities Commission for the State of Kansas, and such commission is given full power, authority and jurisdiction to supervise and control the public

utilities and all common carriers, as hereinafter defined, doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

Sec. 2. All laws relating to the powers, duties, authority and jurisdiction of the Board of Railroad Commissioners of the state are hereby adopted, and all powers, duties, authority and jurisdiction by said laws imposed and conferred upon the said Board of Railroad Commissioners, relating to common carriers, are hereby imposed and conferred upon the Commission created under the provisions of this act.

Sec 10. Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier and to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions, and to make just and reasonable rules, classifications and regulations; and every unjust or unreasonable discriminatory or unduly preferential rule or regulation, classification, rate, joint rate, fare, toll or charge demanded, exacted or received is prohibited and hereby declared to be unlawful and void, and the Public Utilities Commission shall have the power, after notice and hearing of the interested parties, to require any common carriers and all public utilities governed by the provisions of this act to establish and maintain just and reasonable joint rates wherever the same are reasonably necessary to be put in, in order to maintain reasonably

sufficient and efficient service from such public utilities and common carriers.

Sec. 11. Every public utility and every common carrier doing business in Kansas, over which the Public Utilities Commission have control, shall publish and file with the Public Utilities Commission copies of all schedules and rates, joint rates, tolls, fares, charges, classifications and divisions of rates affecting Kansas traffic, either state or interstate, and shall furnish said Commission with copies of all rules, regulations and contracts between common carriers or public utilities pertaining to any and all service to be rendered by such public utility or common carrier. The Public Utility Commission shall have power to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs, and classifications of all rates, joint rates, tolls, fares, charges and all rules and regulations of such public utilities and common carriers.

Sec. 12. No common carrier or public utility governed by the provisions of this act shall, knowingly or willfully, charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates; or demand, collect or receive any rate, joint rate, toll, fare or charge not specified in such schedule or classification; provided, that rates different from those specified in the printed schedule or classification of rates may be charged by any public utility, street or interurban railway, by agreement with the customer, in cases of charity, emergency, festivity or pub-

lic entertainment; provided, that any utility governed by the provisions of this act may grant to the officers, employees and agents of such utilities free or reduced rates or service upon like terms and in the same manner as is now provided by law relating to common carriers.

Sec. 13. It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the Commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this Commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the Commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and

reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity or convenience require, the Commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be opened to all users of a like kind of service under similar circumstances and conditions.

Sec. 14. Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, that any service performed or to be performed by such public utility or common carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates,

joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the Commission without a formal public hearing, of which due notice shall be given by the Commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such Commission shall have power to make or to hold may be made or held before any one or more Commissioners, and all investigations, hearings, decisions and orders made by a Commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the Public Utilities Commission, when approved and filed by such Commission and filed in their office, and the Commission shall have power to require such public utilities and common carrier to make such improvements and do such acts are are or may be required by law to be done by such public utility or common carrier.

Sec. 15. Whenever notice shall be required by the provisions of this act to be given any common carrier or public utility governed by the provisions of this act, and the complainant, or either of them, thirty days' written or printed notice of the time and place when and where such investigation or hearing will be had shall be given, such notice to be served by mailing a copy thereof to the public utility or common carrier and complainant. Such notice shall embody in substance the complaint, if any, made against the public utility or common carrier upon which the hearing, investigation and decision of the Public Utilities Commission is requested or on which it will be given. The public utility

or common carrier, or the complainant or complainants, if any, shall be entitled to be heard and shall have process to enforce the attendance of witnesses and the production of books, papers, maps, contracts, reports and records of every description affecting the subject matter of the investigation. The Public Utilities Commission may, without præcipe or demand therefor, require the production of any books, papers, contracts, records or other documents in the possession of or under the control of the common carrier, public utility, complainant or complainants, affecting the subject matter of the controversy.

Sec. 16. If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the State of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of

any of the laws of the State of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect.

Sec. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper

reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the Commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

Sec. 21. Any common carrier or public utility governed by the provisions of this act, or other party in interest, being dissatisfied with any order of the Commission fixing any valuation, toll, rate, joint rate, fare, charge, or findings, rules or regulations, classifications, schedules, or any order or ruling fixing any regulations, practices or service, or order or ruling relating to the issuance of stocks, bonds or other securities hereinafter provided may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the Public Utilities Commission as defendant, to vacate and set aside any such order, finding or decision of the Public Utilities Commission on the ground that the valuation, toll, rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable, or that any such regulation, valuation, practice or service fixed in such order or decision is unreasonable. All actions

brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different nature pending in such court, and such action shall be tried and determined as other civil actions. Appeals from any decision of the District Court shall be taken from the District Court to the Supreme Court of the State of Kansas, in the same manner as provided by law in other civil actions. During the pendency of any action under the provisions of this act, all orders made by the Public Utilities Commission prescribing rates, joint rates, tolls, fares, charges, rules, regulations, classifications or schedules or findings shall, unless temporarily stayed or enjoined, remain in full force and effect until final judgment is rendered therein. During the pendency of such appeal the judgment of the lower court shall remain in effect, unless stayed by order of the Supreme Court. Service of summons on any member of the board shall be sufficient service on the board.

Sec. 30. Unless the Commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service on the first day of January, 1911.

Sec. 41. The provisions of this act and all grants of power, authority and jurisdiction herein made to the Commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the Commissioners."

The Supreme Court of the State of Kansas in *State ex rel. Caster* v. *The Kansas Postal Telegraph Cable Company,* 96 Kans. 298, after citing some of the foregoing sections of the Public Utility Law, said:

> "It will be seen from the foregoing statutes that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The Public Utilities Commission succeeding to all the powers conferred upon the State Board of Railroad Commissioners and by its own enlarged powers conferred by later enactments, has power to supervise the conduct of public service corporations in this commonwealth (page 303). * * *
>
> Continuing this examination of later enactments, we find the Commission vested with full power, authority and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority and jurisdiction. That is to say, whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred. (Utilities Act, Laws 1911, ch. 238, Sec. 1, 41.) And Sec. 2 of the Utilities Act virtually extends the power already given over railroads to public utilities (page 304). * * *
>
> Sec. 20 also is quite pertinent. It provides that if a public utility desires to change any rule, regulation or practice, it shall apply to the Commission for leave to change such practice, etc., and no change in such practice, etc., shall be made without the sanction of the Commission (page 305). * * *

> Neither do we discover the force of defendant's contention that Section 20 of the Utilities Act is void as sought to be applied in this case. What is it but a fair exercise of governmental authority, a method of procedure prescribed by law for the effective supervision of defendant's public service business?"

It may, therefore, confidently be said that the foregoing sections of the Public Utility Law delegate the state's power of supervision and control of public utilities to the Public Utilities Commission. Section 10 requires every public utility to furnish reasonably efficient service, to establish just and reasonable rates, and every unjust or unreasonably discriminatory rate is declared to be unlawful and void, and the Commission is given power to require all jublic utilities to establish and maintain just rates in order to maintain reasonably sufficient and efficient service. Section 11 requires every public utility to publish and file with the Commission copies of its schedules of rates. Section 12 provides that no utility shall charge, collect or receive a greater or less compensation for the same class of service performed by it within the state than is specified in its printed schedules.

The law then provides two separate and distinct methods by which rates of public utilities on file with the Commission may be changed or modified. Sections 13, 14, 15 and 16 provide the method to be pursued where the Commission upon complaint, or upon its own initiative, proceeds *against* a pub-

lic utility to investigate its rates, charges, exactions, etc. These sections provide for the giving of notice to the utility, a public hearing, and further provide that if the Commission finds that the utility's rates, charges or exactions are unjust, unreasonable, unjustly discriminatory, or unduly preferential, the Commission shall have power to fix and order substituted therefor such rates or schedules of rates as shall be just and reasonable. Section 16 provides that all orders and decisions of the Commission whereby rates, charges, schedules, etc., relating to any service performed or to be performed by a public utility are altered, changed, modified, fixed or established, shall be reduced to writing and a copy thereof duly certified shall be served on the public utility, and such order or decision shall become effective within utility itself. This section provides that a public utility shall, unless an action is commenced in a court of proper jurisdiction to set aside such order or decision, carry the said order into effect. As already stated, these sections last cited refer to proceedings instituted against a utility.

Section 20 of the law provides a method for changing existing rates upon the application of the utility itself. This section provides that a public utility desiring to make any change in its rates or schedules of charges, shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by the public utility. No change shall be made in any rate or schedule or charges without the consent

of the Commission. It will be noted that this section makes no provision for findings of fact by the Commission, it only requires the consent of the Commission to be obtained before the new rates or schedules go into effect.

Section 21 provides a method by which any party dissatisfied with any order of the Commission fixing rates, charges or schedules, may obtain a review thereof by a proper court to the extent only that the court may vacate the order if it be adjudged unlawful or unreasonable. This section requires the dissatisfied complainant to commence within thirty days after the making of the order an action in a court of competent jurisdiction against the Public Utilities Commission as defendant, to vacate and set aside the order, on the ground that the rates, charges or schedules "in such decisions are unlawful or unreasonable." The section further provides that all actions brought under this section shall be tried and determined as other civil actions. This means, as we understand it, that the burden of proof is upon the person bringing the action to establish his claim that the order of the Commission is unreasonable or unlawful. This would be the rule in any civil action. Furthermore, the Supreme Court of the State of Kansas has held that there is a presumption of validity and reasonableness attending the orders of the Commission. This was held in the case of *Union Pacific Railroad Company* v. *Public Utilities Commission*, 95 Kans. 604, l. c. 617. In that case the court held that

the plaintiff, railroad company, must carry the burden of showing that an order of the Commission was not just or reasonable. See also *State* v. *Missouri Pacific Railway Company*, 76 Kans., l. c. 495.

Section 18 of the Public Utility Law also undertakes to make the orders of the Commission *prima facie* reasonable. The section is as follows:

> "All orders, regulations, practices, services, rates, fares, charges, classifications, tolls, and joint rates fixed by the Commission shall be in force and effect on and after thirty days from the making thereof and expiration of thirty days after service aforesaid, shall be *prima facie* reasonable unless, or until, changed or modified by the Commission or in pursuance of proceedings instituted in court as provided in this act."

While the language of this section is not clear, it can at least be construed to mean that the orders of the Commission are *prima facie* reasonable when attacked in a direct proceeding instituted in court as provided in the act.

A critical examination of the foregoing sections of the law show that there is no requirement that the Utilities Commission in changing existing rates of public utilities must make findings of fact or give any reason in the order itself for the conclusion or decision of the Commission. The only provision as to the form of the order is contained in Section 16, which says that the order shall be reduced to writing and a

copy thereof served on the public utility affected thereby. Section 20, which expressly authorizes the procedure under which the public utility may apply for authority to change its existing rates, only requires the consent of the Commission. These sections, of course, do not vest in the Commission any arbitrary power to change existing rates in an unreasonable or an unlawful way, either on its own motion or upon the application of a consumer or of the public utility itself. It is our understanding, however, that the legislature of the State of Kansas, as was stated in *State* v. *Postal Telegraph Cable Company, supra*, has by this law established a comprehensive program for the regulation and control of public service corporations. That the orders of the Commission are subject to the scrutiny of the courts but are only to be set aside on the ground that the orders are unlawful or unreasonable, and unless the court upon an investigation of the evidence introduced before the Commission can find that the order is unlawful or unreasonable, the order must stand, for the courts have no power to substitute their judgment as to reasonable rates in place of the judgment of the Commission.

In the case of *State* v. *Missouri Pacific Railway Company*, 76 Kans., 467, the court said:

> "There is nothing substantial in the contention that the statute authorizes the court to try the whole controversy and make such orders as it may deem reasonable and just, and that the order when reviewed and revised becomes a judicial order. This court is not given

> authority by the act to make any rule, order or regulation, its authority is limited to the inquiry whether the order already issued is reasonable and just."

This language is quoted with approval in *Union Pacific Railroad Company* v. *Public Utilities Commission,* 95 Kans., l. c. 614, and in *State ex rel. Caster* v. *Kansas Postal Telegraph Cable Company,* 96 Kans., l. c. 307.

Appellant, proceeding under the provisions of Section 21, within thirty days from the making of the order in question commenced this action in the United States District Court for the purpose of having the order vacated. It is our contention that the only question presented to the court in this proceeding was to determine whether or not the order was unlawful or unreasonable. We think it sufficiently appears from the foregoing sections of the Public Utility Law that this order is not *unlawful* upon its face. That to determine whether or not it was *unreasonable* the trial court must have considered the evidence introduced before the Commission. Upon this question the form of the order was not conclusive but the court must of necessity be advised of the evidence upon which the Commission acted, and determine from that evidence whether existing rates were unreasonable, and also whether the new rate was reasonable. It is our contention that the trial court could not intelligently determine from the

pleadings that the order of the Commission was either unlawful or unreasonable.

State v. *Mo. Pac. Ry. Co.*, 76 Kans., l. c. 491.

III.

Validity of the order should depend upon the evidence and not on the form of the order.

Assuming, for the purpose of this argument only, that the provisions of Sections 12, 13, 14 and 15, apply to this proceeding, and that the Commission in order to change the rates fixed in appellee's contract must have reached the conclusion that these rates were unjustly or unreasonably low or discriminatory or unduly preferential, we here review briefly the allegations of the pleadings, which in so far as the motion for judgment on the pleadings is concerned, are admitted to be true. The important allegations are that the Public Utilities Commission is vested with full power, authority and jurisdiction to supervise and control public utilities doing business in the State of Kansas and to fix and regulate rates. On May 2, 1910, appellant Kansas Gas & Electric Company, and appellee entered into a contract fixing rates for service for a period ending November 30, 1930. Prior to March 25, 1918, appellant Kansas Gas & Electric Company, filed its application with the Commission for authority to add a surcharge to its existing rates for electricity. The application stated that existing rates were based upon the cost of producing and distributing electrical energy

in normal times and were intended to and did yield the company a reasonable return only on the fair value of its property. That on account of the unusual conditions due to the war, the cost of producing and distributing electrical energy had increased enormously on account of the increased cost of fuel and labor. That if existing rates were continued in effect under conditions then existing, the result would be to deprive defendant of a reasonable return upon the value of its property. The application alleged that the cost of producing electricity for the year ending December 31, 1917, was approximately 100 per cent greater than the cost of production in 1914. That on account of such increase the net income of the company was for the year ending December 31, 1917, approximately $190,000.00 less than it would have been if the company had operated under normal conditions. That if the existing rates were continued in effect, the result would be to deprive the company of a reasonable return upon the value of its property, making it impossible to market its securities, which must be sold in order to provide funds with which to make necessary improvements and to furnish proper and adequate service. The application contained the schedule of increased rates, consisting of a surcharge to be added to the rates to large consumers of electricity. Upon filing the application the Public Utilities Commission, after due notice to all parties concerned, including the appellant, entered upon a hearing of the application. That the appellant was present and participated at the hearing. That

evidence was introduced in support of and in opposition to the application, and that the Commission after full investigation and being fully advised in the premises entered its order by the terms of which it found that the appellant should be authorized and permitted to add to its existing rates the surcharge set out in the order, and further authorized appellant to add the said surcharge to its existing rates. That said order has not been revoked nor modified.

It thus appears from the pleadings that the application was based on allegation to the effect that existing rates were unreasonably low; and as the order carries a presumption of validity and the burden of proof is upon the appellant to show that the order was unreasonable or unlawful, it must be presumed for the purpose of a motion for a judgment on the pleadings that the Commission found the facts stated in the application to be true The applicant had no control over the form of the order made by the Commission, its only duty was to introduce the necessary evidence before the Commission to authorize an order permitting it to charge reasonable rates. We therefore contend that its right to enforce these rates must be determined, not by the form of the order made by the Commission but by the evidence which was introduced to support the order. The motion for a judgment on the pleadings should therefore have been overruled.

IV.

The Public Utilities Commission is not a court.

An examination of the opinion of the trial court indicates that the court considered that the Public Utilities Commission in making the order in question was acting in some sense as a court. The court in reaching the conclusion that the Commission in its order should have found facts to sustain the exercise of the Commission's statutory powers, cited the case of *Carron* v. *Martin*, 26 N. J. Law, 594; 69 Am. Dec. 584; in which it was said:

> "Tribunals with special powers for adjudicating in particular cases, under the various names of commissioner, surveyors, appraisers, committees, directors, overseers, and the like, little or in nowise relating to the general administration of justice, whose mode of proceeding are prescribed in the statutes by which they are created, are of a different class (from courts of general jurisdiction); and unless their proceedings on the face of them show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it."

An examination of this case will show that the tribunal in question was the city council of Newark, New Jersey, and that the council was acting judicially or quasi judicially.

The trial court also cited the case of *Commissioners* v. *Johnson*, 39 So. 910, and quoted from

the opinion of the Supreme Court of Alabama as follows:

> "The commissioners' court, in the exercise of statutory powers, as were conferred by the act in question, *is a court of limited jurisdiction* (*italics ours*), and to uphold its proceedings under the statute its records must affirmatively show the existence of the facts upon which its authority rests."

The trial court further quoted from the opinion in the cases of *Detroit, etc., Railroad* v. *Railroad Commission,* 171 Mich. 335, 137 N. W. 329, 333, as follows:

> "The legislature has not fixed the freight rates to be charged by complainant beyond this: It has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases whether a rate is reasonable and just or unreasonable and unjust, and to thereupon make an order in conformity with the facts. The facts being found, it is the legislature which speaks, approvingly or disapprovingly, as the case may be. The important business of the Commission with respect to rates is ascertaining facts. Its findings are not conclusive, but have the effect of establishing *prima facie* that the rates considered are reasonable and just and therefore lawful, or are unreasonable and unjust and unlawful."

Evidently the trial court did not have an opportunity to read all of the opinion of the Michigan court. After the passage above quoted, the opinion proceeds as follows:

> "Its orders stand until modified or set aside by it or by the courts. The duty of the courts in the premises is not essentially different from that of the Commission. No different conclusion was stated in *Michigan Central R. Co.* v. *Wayne Circuit Judge*, 156 Mich. 459 (120 N. W. 1073, 16 Am. & Eng. Ann. Cas. 832). It is only after determining that the rate fixed by the Commission is unreasonable that the court may set it aside. Presumptively, the findings and orders of the Commission are right. If attacked, the complainant has the burden of showing 'by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be.'
>
> The difficulty and perplexity of such an inquiry would deter any one, to whom the task was not a duty, from pursuing it, in the first instance, and from reviewing a determination once made. *It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the Commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable.* (Italics ours.) We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a personal examination of the locality in which the service of complainant is performed, and by knowledge acquired independent of the testimony pro-

> duced before it. Manifestly, this court cannot share in knowledge so acquired, unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record."

The Michigan court thereupon considered the testimony introduced before the Commission, and found the order of the Commission to be a just one; the court at the conclusion of the opinion, saying:

> "We repeat that the rates made by the Commission are *prima facie* reasonable and just. They must be shown to be unjust and unreasonable. Indulging the statute presumption we are unwilling to hold that the rate prescribed by the Commission is unreasonable (page 365)."

It is apparent, therefore, from the Michigan case that that court, while it held that the important duty of the Commission was to ascertain facts, nevertheless found that it was not the duty of the Commission to state these ultimate facts in its order.

V.

The Commission an Administrative Board.

The view adopted by the trial court that the Public Utilities Commission must make findings of fact in order to give validity to an order of the kind here in question, must be based upon the assumption that the commission is a judicial tribunal

or at least one exercising judicial powers. If the power to determine the reasonableness of existing rates and to set aside unreasonable rates is not judicial, then the authorities cited in the court's opinion as well as those referred to in appellant's argument, are not in point. We think the question is disposed of by the Supreme Court of Kansas in the case of *State* v. *Missouri Pacific Railway Company*, 76 Kans. 467. It is true that the court in that case had before it for consideration the Kansas statute establishing the Board of Railway Commissioners. However, the present Public Utilities Commission has succeeded to all the powers of the old Board of Railroad Commissioners (Sec. 2, ch. 238, Session Laws 1911), and the decision of the court is applicable to the present Public Utilities Commission.

That was an original proceeding in mandamus brought in the Supreme Court of Kansas, at the relation of the attorney for the Board of Railroad Commissioners to compel the railroad company to obey an order of that board requiring it to install and operate passenger train service on a branch of the defendant's railway. The defendant attacked the constitutionality of the law creating the Board, on the ground that the law attempted to delegate to the board legislative authority. The court, in its opinion, referred to the fact that the power to create commissions to regulate and control the operation of common carriers and to fix rates for the transportation of passengers and freight, and to hear and determine complaints

against the carriers has been repeatedly recognized and upheld by the Supreme Court of the United States. The Kansas court held that while the legislative power cannot be delegated, nevertheless the absolute independence of the three departments of government is impracticable, and was not intended by the Constitution of Kansas. The court distinguished the law establishing the Board of Railway Commissioners from the Court of Visitation Law which had been held unconstitutional (*State* v. *Johnson*, 61 Kans. 803), and held that the objections which had been urged against the latter law, were not applicable to the former. The court said:

> "The power conferred is uniformly held to be administrative in its character, though the term 'executive' has been used by the Supreme Court of the United States in defining it. It has, however, no relation to or dependence upon the executive power spoken of as one of the three governmental powers, for its function is that of carrying into effect the legislative will, and in its operation it is a part of the legislative act (p. 476)."

The court then quotes the following language from Justice Brewer in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, l. c. 394, 38 L. ed. 1014, l. c. 1022:

> "Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 29

> L. ed. 636. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the Railroad Commission and intrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state."

The Supreme Court of Kansas, therefore, in disposing of this objection to the law, held that the power of the legislature to delegate merely administrative functions in this manner, is no longer an open question, and such power clearly exists.

The further contention was made in the Missouri Pacific case by the defendant that the act was void because it conferred upon the Board of Railway Commissioners a combination of *legislative*, *executive* and *judicial* powers. The court in disposing of this objection, first laid down the elementary proposition that every statute is presumed to be constitutional, and that no act of the legislature should be held unconstitutional unless its vice is apparent. The court then considered Sections 4 and 9, of Chapter 340, of the Laws of 1905, the provisions of which were asserted by the defendant to combine executive, legislative and judicial power in the board of Commissioners.

A portion of Section 4 is as follows:

> "It shall be the duty of said board, from time to time, to alter, change or amend any such schedule, classification, rate, rule or regulation established by any railroad company or companies which the board, upon complaint as hereinafter provided, may find to be un-

reasonable, unjust, or discriminative; and such amended, altered or new schedule, classification, or rate, rule, or regulation, shall be put into effect by such railroad company or companies within not more than thirty days after receiving written notices of the order of the board; provided, that before such order is made by the board notice and a hearing shall be given as required in Section 9 of this act."

That part of Section 9 describing the procedure before the Railroad Commission is as follows:

"Before proceeding with such hearing the board shall give to the complainants and railroad company ten days' notice in writing of the time and place of entering upon same. Such complaint shall be heard in an informal manner, without further pleadings, and under such rules and regulations as the board may from time to time provide in order to secure a speedy hearing and an equitable determination of the questions involved. The attorney for the Board of Railroad Commissioners shall appear at such hearing on behalf of the complainant or complainants, and the complainant or complainants may, if they desire, employ other counsel to assist in the preparation and hearing of any such complaint. If upon such hearing it shall appear to said Commissioners that the complaint is well founded, and that any material matters alleged are true, they shall so adjudge, and shall find and decide what are reasonable tariff charges, classifications, rules and regulations respecting the matters involved, and respecting the same matters on the entire line of such railroad in this state."

The court held that the functions of the Board of Railway Commissioners under this act are clearly administrative; and the fact that in the performance of these functions the court must hear complaints and determine them does not make their acts judicial. The court said:

> "Where judgment or discretion is exercised as a mere incident to a ministerial power it has never been held to be the exercise of judicial power within the meaning of constitutions which, like ours, provide for the separation of the three departments of government (*Owners of Landis* v. *The People ex rel.*, 113 Ill. 296; *Rich et al.* v. *City of Chicago*, 59 Ill. 286, 295). In fact the cases we have quoted from sustaining the power of legislatures to create boards of this character, and to confer upon them power to regulate and control common carriers, afford a sufficient answer to the contention that the power conferred is either legislative, executive or judicial (page 484)."

Said Sections 4 and 9 of Chapter 340, Laws of 1905, have been carried forward (with amendments immaterial to the question in hand) and retained in the law governing proceedings before the Public Utility Commission with reference to rates to be charged by railroad companies. Said Section 4 is now Section 8390, and Section 9 is now Section 8416, of the General Statutes of Kansas of 1915, so that the decision in the Missouri Pacific case really construes the powers of the Public Utilities Commission under the present statute. Furthermore, the provisions of Section

13 of the Public Utilities Law above quoted providing for the institution by the Commission, either upon complaint or on its own initiative of proceedings, to investigate rates of a public utility have not substantially changed the foregoing sections of the Railroad Commission Law as to the power of the Commission to pass upon and declare present rates unreasonable and discriminatory and to order others substituted in lieu thereof. An examination of these statutes will show that their provisions are almost identical and substantially the same.

The Supreme Court of Kansas having held that the power of a board to determine that existing rates are unreasonable and to substitute in lieu thereof reasonable rates is not a judicial function, such decision is binding upon the Federal Court in this case.

Hunter v. *Pittsburg*, 207 U. S. 161, 52 L. ed. 151.
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 57 L. ed. 1416.

VI.

Statutory provision concerning form of Commission's orders.

Counsel for appellant, in support of the contention that findings of fact should have been made by the Public Utilities Commission, cite *Public Utilities Commission* v. *Springfield Gas Company*, 291 Ill. 209, and *Public Utilities Com-*

pany v. *B. & O. S. W. R. R. Co.*, 281 Ill. 405. These cases are not in point for the reason that Section 65 of Chapter 111a Revised Statutes of Illinois 1917 (Public Utility Act) requires the Commission of that state to make and render "findings concerning the subject matter and facts inquired into, and enter its order based thereon."

Decisions of the Supreme Court of the United States holding that findings must be made by the Interstate Commerce Commission and decisions of courts construing the Missouri Public Utility Act are also not in point for the reason that the Interstate Commerce Law (Section 8582 U. S. Compiled Statutes 1918) expressly provides that the Interstate Commerce Commission shall make findings of fact in certain cases, and the statute creating the Missouri Commission expressly provides that findings of fact shall be made (Subsection 2, Section 29, Laws of Missouri, 1913, page 616).

The Public Utility Law of Kansas makes no such requirement with reference to the orders of the Kansas Public Utility Commission. The law simply provides that all orders and decisions "shall be reduced to writing and a copy thereof duly certified shall be served on the public utility or common carrier affected thereby, by registered mail" (Section 16).

The Circuit Court of Appeals ruled correctly upon this contention as follows:

> "That the Commission, when making the order complained of, made no special findings of fact, is wholly immaterial as there is nothing in the act creating the Commission and defining its duties and powers requiring it." (Transcript, page 59.)

VII.

Record Shows Jurisdictional Facts.

Even if the Kansas Public Utilities Commission was a tribunal of limited jurisdiction and its orders subject to the rule that the record should affirmatively show that it had jurisdiction to make the order in question, still all necessary jurisdictional facts were stated in the application of the Electric Company to the Commission and that application is as much a part of the record as the order itself. On this point the Circuit Court of Appeals said:

> "It is next contended that the order of the Commission does not state facts necessary to show that it had jurisdiction, and the rule that when a special tribunal, created with special powers to act, not in conformity with the rules governing actions at common law *inter partes*, the record must show all the facts necessary to establish jurisdiction is invoked. But the petition of the Gas & Electric Co. to the Commission, is as much a part of the record as the order, and it contains all the allegations necessary for the Commis-

sion to act in the matter. The petition is a part of the record. The allegations in the petition determine the jurisdiction. *Hartford Life Ins. Co.* v. *Johnson*, decided June 28, 1920." (Transcript of Record, page 59.)

VIII.

Under the Kansas Statute findings of fact by the Commission would be useless.

It cannot be contended that the appellant in this case has in any way been prejudiced or injured by the failure of the Commission to make findings of fact. The Commission is not a court, it has no power to put its orders into effect except through the assistance of a court, and before any order made by it can be enforced, such order must first have passed judicial scrutiny concerning its reasonableness. Section 21 of the Public Utility Law gives the plaintiff the right to commence an action in any court of competent jurisdiction to vacate the order. This action was begun by the plaintiff within thirty days from the date of the making of the order, the plaintiff was at liberty to urge any objection that it had to make against the validity of the order, and it has done so in this case. Its rights in this court are in no wise limited or curtailed because no findings of fact were made by the Commission; and if such findings had been made they would in no wise affect the jurisdiction or action of the reviewing court.

The Kansas statute does not provide for reviewing findings of fact. The statute provides for a

trial *de novo*. Neither party is limited to or bound by the facts, if any, found by the Commission, but may introduce any evidence tending to show that the order is either reasonable or unreasonable, lawful or unlawful. That this was the procedure to be followed under the Kansas statute as understood by appellant's counsel is evident from the provisions of the stipulation which was entered into in this case appearing at page 26 of the transcript, as follows:

> "It is further stipulated and agreed that upon the final hearing in the above entitled cause, which shall be at the earliest convenience of the court, the transcript of the evidence taken before the Public Utilities Commission at the hearing of the application for said surcharge may be used by either side, subject to objection as to competency, relevancy or materiality, and either side may introduce such further competent, relevant and material evidence as it may desire."

Under this procedure authorized by statute and concurred in by appellant's counsel by stipulation, the making of findings of facts by the Commission would have been a useless ceremony.

IX.

Purpose of Order Was to Increase Rates.

The trial court gave as one reason for the invalidity of the order of the Commission as applied to appellant, the failure of the Commission to find that there was any discrimination between

the rate fixed in the contract and other rates charged other members of the public (Trans. 39). We submit that no such finding was necessary for the reason that the order was not based upon any such discrimination. An examination of the order and of the facts stated in the pleadings shows that the order was not made to remove a discrimination existing between appellant and other consumers but was made to increase the rate of large consumers of electricity, including appellant, who happened to be in the class affected by the surcharge order. Under the provisions of Section 12 of the Public Utility Law above quoted it was the duty of the Electric Company to collect the rates fixed in the order from all consumers affected by it. To have increased the rates to other consumers not having contracts without making a similar increase to appellant would have caused discrimination in favor of the latter. The authorities cited above establish the doctrine that appellant stands in no better position than other consumers of its class, by reason of its contract.

X.

The order of the Commission classified consumers and no special reference to appellant's contract was necessary.

The Commission heard and considered the Electric Company's application for permission to add surcharges to its existing rates to power consumers. Appellant was notified of the hearing and was present and participated. After a full investigation

the Commission entered its order finding that the Electric Company should be authorized to add to its existing rates the schedule set out in the order. It classified the power consumers and fixed a surcharge to be added to the existing rates of consumers in each class. Appellant fell into one of these classes, and the effect of the order was to increase its rate until the further order of the Commission.

Counsel for the appellant appear to be of the opinion that this order could not be made effective against the appellant without special reference being made in the order to appellant's contract. This is not the law. In both the Union Dry Goods Company case and the Kansas City Bolt and Nut Company case, *supra*, the orders of the respective commissions were orders establishing a general schedule of rates and no special reference was made in the orders to the contracts of the plaintiffs. In the case of *Louisville & N. R. Co.* v. *Dickerson* the Circuit Court of Appeals for the Sixth Circuit, in referring to rates filed by a common carrier with the Interstate Commerce Commission, said:

> "The cardinal purpose of the provisions of the public establishment of tariff rates is to secure uniformity, reasonableness and certainty of charges for service. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become a matter of public right and forbid private contracts inconsistent therewith." (191 Fed. Rep. l. c. 709.)

The Circuit Court of Appeals in its opinion in this case said:

> "The Commission made no order against the Railroad and Light Company; there is nothing in the order referring to any contract in existence; all the order attempts to do and does is to classify the customers of the Gas and Electric Company and allow a surcharge on three of the four classes in which they are divided; that the Commission has under the law creating it authority to classify customers, is not questioned, nor can it well be." (Trans., p. 57.)

XI.

The Circuit Court of Appeals did not commit error in dismissing the complaint.

Counsel specify as error the action of the Circuit Court of Appeals in directing the District Court to dismiss the complaint instead of remanding the case for trial upon the merits.

But appellant submitted the case on its motion for judgment on the pleadings. In this motion it recited:

> "Wherefore, plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount in controversy being admitted to exceed three thousand dollars, exclusive of interest and costs, and it being admitted in this case that the final and determining isssue is the binding effect upon this plaintiff of said order of said Commission as above set forth, and it appearing

> from inspection of said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing, and the introduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause of record appearing in this court, and in presenting its motion, plaintiff saves and reserves to itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated, involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion and a similar motion filed herein by plaintiff against defendant, The Public Utilities Commission of the State of Kansas." (Trans., p. 31.)

True, appellant in said motion attempted to reserve the right to present evidence at a hearing on the merits should its motion be overruled. The Circuit Court of Appeals rightly held in effect that the attempted reservation was ineffective in view of the submission of the cause to the trial court for final judgment on the pleadings and in view of appellant's admissions in its motion for judgment, wherein it asserted that all necessary facts appeared upon the face of the order complained of or were admitted by the pleadings. So that the introduction of evidence and proof was wholly unnecessary. The cause having been thus submitted and the record containing the admissions noted, the direction to dismiss the bill of complaint followed.

XII.

No Federal Question Presented.

Appellees have filed a motion to dismiss the appeal in this cause or to affirm the judgment of the United States Circuit Court of Appeals for the reason that no real or substantial federal question is presented by the bill of complaint or by the record. That no federal question is relied on appears from an examination of the specification of errors contained in appellant's brief as well as from the argument of appellant's counsel.

Under the rule of this court errors not specified will be disregarded. In appellant's specification of errors no reference is made to any error on the part of the Circuit Court of Appeals in deciding any constitutional or federal question. No reference whatever is made to the fifth or fourteenth amendments to the Constitution. The third and sixth specifications (pages 17 and 18, appellant's brief) do not question the power of the Kansas Public Utilities Commission to change rates fixed by contract between the parties. That this power exists is admitted by counsel for appellant in their brief (page 61). It seems apparent, therefore, both from appellant's specification of errors and from the brief and argument of its counsel that no constitutional or federal question is relied upon here, the evident purpose of this appeal being to obtain a review of questions which were passed upon by the Circuit Court of Appeals and which were exclusively within the jurisdiction of that court.

Appellant is not now asserting as it did assert in its bill of complaint (Trans., p. 4) that the contract rates were protected by the provisions of Section 10, Article I, of the Constitution, and that the state in the exercise of its police power could not change these rates. On the contrary, appellant in its assignment of errors, Paragraph II, Section L (page 98), admits the power of the Public Utilities Commission "in a proper case, upon proper claim, pleadings, showings and findings," to set aside contract rates in the exercise of the police powers of the state. The assignment of errors, therefore, presents no question involving the application of Section 10 of Article I of the Constitution.

It is further to be noted that the trial court in its opinion holding void the order of the Commission, expressly held against appellant's contention that the contract rate was protected by the provisions of Section 10, Article I, of the Constitution (page 37). The decree sustained appellant's motion for judgment on the pleadings for two reasons, both of which are set out in the decree, and neither of which involves any federal question (page 43).

Appellant did not appeal from the decree of the District Court, and is, therefore, precluded from complaining here of the action of the trial court in holding that the rates fixed in the contract were subject to change by the state in the exercise of its police power. (*Landram* v. *Gordon*, 203 U. S.

56, 51 L. ed. 88; *Southern Pine Lumber Company* v. *Ward*, 208 U. S. 126, 52 L. ed. 427.) The appeal should be dismissed or the judgment of the Circuit Court of Appeals affirmed.

Respectfuly submitted,

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H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.